REPORT

OF THE

COMMITTEE TO STUDY COMBINES LEGISLATION

AND

INTERIM REPORT ON

RESALE PRICE MAINTENANCE

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TO THE MINISTER OF JUSTICE

COMMITTEE TO STUDY

COMBINES LEGISLATION

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LETTER OF TRANSMITTAL

OTTAWA, March 8th, 1952

The Honourable Stuart S. Garson, P.C., Q.C.,
Minister of Justice and Attorney-General of Canada,
Ottawa, Canada.

DEAR AND HONOURABLE SIR,

We submit herewith our report on combines legislation.

Yours very truly,

J. H. MACQUARRIE
W. A. MACKINTOSH
G. F. CURTIS
MAURICE LAMONTAGNE

Committee to Study Combines Legislation.

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[1] Not included in this edition.

FOREWORD

Our appointment as a committee to study combines legislation was announced by the Minister of Justice in the House of Commons on June 27, 1950.

The terms of reference of the Committee were: "to study, in the light of present day conditions, the purposes and methods of the Combines Investigation Act and related Canadian statutes, and the legislation and procedures of other countries, in so far as the latter appear likely to afford assistance, and to recommend what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy."

In an interim report, being its report on resale price maintenance submitted on October 1, 1951, the Committee outlined the procedure it followed. For convenience it may be restated that shortly after its appointment the Committee, through the press and by letter, gave widespread notice throughout Canada that it was anxious to receive from individuals, firms and organizations whatever views they might wish to express upon the matters within the terms of reference. National organizations were asked to inform their affiliated groups and individual members of the desire of the Committee to secure as wide an expression of opinion as possible.

In this, as throughout our work, the press gave most helpful co-operation.

Many submissions were received by the Committee in the succeeding months. In addition to the written submissions, opportunity was given for all interested persons to meet with the Committee to discuss and amplify any matters arising out of their written representations. Many such meetings were held and, together with the written submissions, were of great assistance.

The report of the Committee follows.

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INTRODUCTION

It is necessary to describe the general framework of the study made by the Committee, because it has an immediate bearing upon the nature of the present report. The three following points, in particular, must be emphasized.

First, the Committee was appointed to recommend what improvements, if any, should be made to the Canadian legislation and not to investigate specific monopoly situations in the country. This report does not attempt to assess the presence or extent of monopolistic tendencies in this country or to describe any concrete situation. Our study starts at one stage further and tries to answer the following question: given the existence of monopolistic conditions, how should they be appraised and checked, if necessary.

Second, the Committee has proceeded in its work with the underlying assumption that the vast majority of the Canadian people supports the free enterprise system. This means that possible solutions to the monopoly problem which are directly incompatible with this system, like overall public ownership of the means of production, have been considered as unacceptable. In other words, the general framework of our study has been determined by the particular features of our free enterprise system.

Third, it must be pointed out that monopoly legislation raises intricate constitutional problems in Canada. Up to now, with few exceptions publicity and criminal prosecution have been the principal means used against monopolies, mainly because the legislation has been based on the federal power over criminal law, and has been upheld by the courts on this ground. There has been a widely held view that the jurisdiction of the Federal Government did not extend beyond the criminal field. This partly explains why other types of action, which have been adopted in other countries, have not been used in Canada. On the other hand, there is another view to the effect that Parliament has under the trade and commerce head of the British North America Act complete jurisdiction in monopoly situations, at least in those involving international and interprovincial trade. However, neither of these views has been sanctioned by judicial decision so that they cannot be considered as settled.

This position the Committee has had to take into account at all points in its study. The constitutional base for monopoly legislation is narrower in Canada than in either the United Kingdom, which is a unitary state, or the United States where the commerce clause of the constitution has received a wide interpretation. Nevertheless the Committee has thought it useful to review the history of our legislation alongside that of the United States and the United Kingdom, they being the two countries with economies most like our own. This will serve to indicate some of the historical and constitutional factors that have influenced the course of monopoly legislation in the three countries.

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I. LEGISLATION

The Canadian Legislation: Organization and Procedures

A comparison with legislation of the United States and the United Kingdom

A. *Historical Background of the Canadian Legislation*

For the sake of convenience the history of the Canadian legislation may be divided into five periods:

1889-1910
1910-1919
1919-1923
1923-1935
1935-to the present time.

(1) *1889-1910*

Canadian combines legislation had its origin in the report of a select committee of the House of Commons appointed in 1888 to inquire into the existence of combinations and trusts in Canada and their effect upon the Canadian economy. The Committee found that combinations inimical to the public interest existed in respect of a number of widely used commodities and services and recommended that legislative action be taken to curb such combinations. In 1889 an Act was passed, the parent of the present section 498 of the Criminal Code, making it a misdemeanour to conspire, combine, agree or arrange unlawfully,

(*a*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or—

(*b*) To restrain or injure trade or commerce in relation to any such article or commodity; or—

(*c*) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—

(*d*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

In the general codification of the criminal law in 1892 the Act of 1889 became a section of the Criminal Code and the offence was made an indictable one. The awkward usage involved by employing the term "unlawfully" as well as "unduly" and "unreasonably" to describe the offence led to early difficulties of interpretation, and after various legislative amendments, the word "unlawfully" was eliminated from the section in 1900 and the wording settled in the form it has retained to the present time.

In its improved wording the section provided the basis for six prosecutions in the next ten years, four of these resulting in convictions. In addition the courts found agreements brought before them in a number of civil suits to be illegal as contrary to the section and refused the parties to the agreements any rights under them. In most of these instances, however, no criminal prosecution followed. Experience showed increasingly that, in combines cases, the problem

of securing evidence was a peculiarly difficult one. In one instance, in this period, it was found necessary to resort to the appointment of a Parliamentary Committee to assemble the facts. It was a task normally beyond the resources of private individuals or the ordinary machinery of criminal investigation.

(2) *1910-1919*

The Combines Investigation Act of 1910 sought to supply, for this weakness, special machinery of investigation. Any six persons could apply to a judge for an order directing that an investigation into an alleged combine be held.

A combine was defined by the Act as (*a*) "any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of restricting the competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof to the detriment of consumers or producers of such article of trade or commerce", including (*b*) "the acquisition, leasing, or otherwise taking over, or obtaining by any person to the end aforesaid of any control over or interest in the business, or any portion of the business of any other person"; and (*c*) "includes what is known as a trust, monopoly, or merger".

If, after hearing, the judge found the situation to warrant an inqury he could issue an order to that effect. The Minister of Labour was then to appoint a board of three commissioners, one selected by the applicants, one by the parties against whom the application was made, and the third, the chairman, who was to be a judge, nominated by the other two members. A board had power to compel the attendance of witnesses, examine them under oath, require the production of documents and general incidental powers to carry out a full inquiry.

A board had wide powers of report; it could make "such findings and recommendations as, in the opinion of the board, are in accordance with the merits and requirements of the case". Reports were to be transmitted to the Minister at the conclusion of an inquiry and to be published in the *Canada Gazette.*

Any person who was found by the board, after inquiry, to have done any of the enumerated acts being the same as those mentioned in section 498 of the Criminal Code, and who did not cease his activities within ten days after the publication of a report to this effect, made himself, under the Act, liable to a *per diem* penalty up to one thousand dollars for each day he continued to offend.

The Act of 1910 also carried forward a provision (which had first found place in Canadian legislation in 1897) for the use of tariff action to combat monopolistic practices. The Customs Tariff Act of 1897 had given authority for the government to have an investigation held by a judge into the existence of a trust or combination that unduly enhanced prices or promoted the advantage of manufacturers or dealers at the expense of consumers. If such a trust or combination were found to exist, the duty on the commodity or commodities affected could be lowered or removed by executive action. By the Act of 1910 this action could be taken when a board or a court had found such a combination existed. Furthermore an additional remedy was provided where a board reported that the owner or holder of a patent had made use of the exclusive rights under it to do any of the enumerated acts being the same as those mentioned in section 498 of the Criminal Code. In such cases the Minister of Justice could institute appropriate proceedings in the Exchequer Court to have the patent revoked.

The expectation was that, through its provision for public investigation and report, the Act would, in considerable measure, deter harmful activities without resort to prosecution; and that this failing, and prosecution becoming necessary, the new procedures for the discovery and marshalling of facts would

facilitate the process of prosecution. In fact, the machinery of the Act was only used once before the country was swallowed up in the concerns of the First Great War. The legislation revealed two prime weaknesses. The first was that private citizens, six in number for each application, were reluctant to shoulder the considerable responsibility, by way of expense and publicity, of initiating investigations. Secondly, there was no individual or body to provide continuity in the administration of the legislation. A board was constituted on an *ad hoc* basis. Upon completion of the investigation and the submission of a report the board ceased to function. There was consequently no machinery to determine whether the recommendations of the report were being carried out or not.

(3) *1919-1923*

The rapid rise in the cost of living which was an immediate economic aftermath of the First Great War led to the appointment of a special committee of the House of Commons in 1919. The committee recommended the setting up of a permanent board to administer legislation dealing with trade combinations and monopolies as well as with profiteering and hoarding.

The consequent legislation set up a permanent board—the Board of Commerce—consisting of three commissioners. The Board was charged with the administration of the Combines and Fair Prices Act. Under this Act the function of the Board was two-fold. The first was the investigation and restraining of combinations, monopolies, trusts and mergers constituting a combine and the second, control over the withholding of and the enhancement of prices of, commodities.

Under the First Part of the Act, the Board could begin an inquiry either upon its own initiative or upon a formal application made to it by one person. It had extensive powers of investigation and, at the conclusion of its proceedings, could make orders requiring persons to cease and desist from any practices found to be contrary to the Act. The Act defined combine as one which, in the opinion of the Board, operated or was likely to operate to the detriment or against the interest of the public and was deemed to include:

> "(*a*) mergers, trusts and monopolies, so called, and,
>
> (*b*) the relation resulting from the purchase, lease or other acquisition by any person of any control over or interest in the whole or part of the business of any other person, and,
>
> (*c*) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of (1) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (2) preventing, limiting or lessening manufacture or production; or (3) fixing a common price, or a resale price, or a common rental, or a common cost of storage or transportation, or enhancing the price, rental or cost of article, rental, storage or transportation; or (4) preventing or lessening competition in, or substantially controlling, within any particular district, or generally, production, manufacture, purchase, barter, sale, transportation, insurance or supply; or (5) otherwise restraining or injuring commerce."

A person who failed to obey an order of the Board was guilty of an indictable offence and the Board might remit a case to the Attorney-General of a province for prosecution.

The Act also carried forward the tariff and patent provisions that had been included in the Combines Investigation Act of 1910.

The Act in its Second Part prohibited hoarding and profiteering. The Board was empowered and directed to inquire into and to restrain and prohibit any breach or non-observance of the Act, the making of unfair profits, and all such practices with respect to the holding or disposition of the necessaries of life, as, in the opinion of the Board, were calculated to enhance their cost or price.

It is to be observed that the legislation overcame two of the principal defects of the Act of 1910, namely the absence of a continuing enforcement authority and the initiation of investigations only on the application of interested private individuals.

The Board entered upon an active life which, however, was cut short when its powers were called in question in a constitutional reference to the courts in 1920. After an equal division of judicial opinion in the Supreme Court of Canada, the Judicial Committee of the Privy Council in 1921, on appeal, held that because of the administrative features of direct control contained in it, the legislation was beyond the competence of the Dominion to enact and it thereupon ceased to operate.

(4) *1923-1935*

The Combines Investigation Act of 1923 followed. The Act was basically the Act as it stands today. The comprehensive definition of "combine" of the legislation of 1919 was largely retained but no administrative power to order the cessation of activities was provided for. A permanent Registrar was to administer the Act; to him, either upon formal application of six persons, or upon ministerial direction, or whenever he himself had reason to believe that a combine existed or was being formed, was committed the power to hold a preliminary inquiry. If after the preliminary inquiry the Registrar concluded or the Minister decided that a formal investigation was necessary, such investigation was conducted by the Registrar or by a commissioner appointed *ad hoc*.

At the conclusion of the formal investigation a report was transmitted to the Minister, and in the case of a commissioner's report had to be made public within fifteen days of its receipt by the Minister except in those cases where the commissioner had recommended that its publication be withheld, in which event the Minister might exercise his discretion as to publication of the report either in whole or in part.

The Act made it a criminal offence to be a party or privy to or knowingly to assist in the formation or operation of a combine. A person found guilty of an offence was liable to a penalty not exceeding $10,000 or two years imprisonment, in the case of individuals, and a penalty not exceeding $25,000 in the case of corporations.

The earlier provisions relating to executive action in respect of tariffs and judicial revocation of patent rights were continued in the new legislation.

The legislation of 1923 after a number of investigations had been held under it in turn came under challenge on constitutional grounds. On a reference as to the validity both of the Combines Investigation Act and section 498 of the Criminal Code, the Judicial Committee of the Privy Council in 1931 held, affirming a judgment to the same effect by the Supreme Court of Canada, the enactments to be within the powers of the Federal Parliament as being legislation in relation to criminal law.

(5) *1935 to date*

In 1935, consequent upon a review of combines legislation as part of a larger inquiry into price spreads and trade practices generally, the Dominion Trade and Industry Commission Act of that year created a three-man commission (the members of the existing Tariff Board constituted, under the Act, the commission) to which the administration of the Combines Investigation Act, including the power to initiate and conduct investigations, was transferred.

The existing provisions for investigation and report accordingly continued; but the new Act also empowered the Commission if it found, as the result of an investigation under the Combines Investigation Act, that wasteful or demoralizing competition existed in an industry, and that agreements among persons in the industry to modify competition would not unduly restrain

trade or operate against the public interest, to recommend approval of such agreements to the Governor in Council. It could also recommend approval where, in its opinion, existing agreements prevented wasteful or demoralizing competition and did not operate against the public interest. The Governor in Council, if of opinion that the conclusions of the Commission were well founded, could approve the agreements and make regulations requiring the Commission to keep a check on the effect of the agreements.

The Commission had the power to require any persons engaged in the industry subject to an approved agreement to furnish full information relating to the operations of the industry, and, on its own motion and in its absolute discretion, could recommend to the Governor in Council that approval of an agreement should be withdrawn.

Approval of an agreement was a bar to prosecution under the Combines Investigation Act or sections 498 or 498A of the Criminal Code except in cases where the Commission gave its consent to such a prosecution.

The Commission could also investigate complaints of unfair trade practices and forward the complaint and any evidence in support thereof to the Attorney-General of Canada with a recommendation for prosecution if it appeared that any federal law prohibiting unfair trade practices had been violated. For the purposes of prosecution, a Director of Public Prosecutions, appointed under the Act, had the conduct of federal prosecutions and could assist provincial authorities when they instituted proceedings in trade practice cases, besides being available to assist the Commission with investigations into complaints.

The Commission could in addition hold trade practice conferences attended by persons engaged in a particular industry for the purpose of considering the trade practices in that industry and determining which were unfair or undesirable in the interest of the industry and of the public. Such conferences could be called by the Commission on the direction of the Governor in Council, at the request of representative persons engaged in the industry, or on its own motion. The Commission could make public the general opinion of the conference or of the Commission as to any trade practice considered to be unfair or undesirable.

The Commission was authorized to co-operate with boards of trade and chambers of commerce in connection with any commercial arbitration. On the direction of the Governor in Council it could conduct general economic studies.

A constitutional reference to the Supreme Court instituted shortly after the Act was passed established that the authority conferred on the Commission by section 14 of the Act to approve agreements limiting competition was beyond federal legislative power. The investigatory provisions were untouched by the decision. Though in form the Board continued to have legal existence until 1949 and from 1937 to 1946 shared jurisdiction over combines with the Commissioner under the Combines Investigation Act, in point of fact the Board did not exercise any functions in respect of the Combines Investigation Act. Since 1946 both legally and in fact the Commissioner has been alone in his position as officer in charge of the Act.

The principal change made by the legislation of 1937 was to restore the administration of the Combines Investigation Act to a single official. The office of the Registrar, which had existed since 1923, was abolished and that of a Commissioner substituted. The machinery for the appointment of special, or *ad hoc,* commissioners was retained. The provision requiring the publication of reports now included the reports of the permanent Commissioner and he normally conducted most of the investigations under the Act. This was a reversal of the former practice. After 1937 the role of the special commissioner

was merely to supplement the staff of the Commission when an immediate investigation was desirable and the Commissioner was already engaged in other duties.

B. *The Present Canadian Legislation*

The principal Canadian legislation is contained in section 498 of the Criminal Code and in the Combines Investigation Act. The former makes it an offence to combine or conspire to do certain acts in restraint of trade; the latter to a large extent overlaps the provisions of section 498 by making it an offence to participate in the formation or operation of a combine and also sets up machinery by which inquiry as to the existence of a combine may be carried out.

The Act is under the general administration of a Commissioner, who may have one or more Deputy Commissioners to assist him. By Order-in-Council special commissioners may be appointed to conduct particular investigations.

Investigations may begin in one of three ways. One is the lodging with the Commissioner of an application by six private citizens, a procedure which first appeared in the Act of 1910 but has been rarely put to use either under that Act or the present one. A second method is a direction from the Minister to the Commissioner to launch an inquiry; but this method has not been much used, particularly since the Commissioner was given an independent initiative in 1946. Nearly all investigations, in practice, now originate with the Commissioner, the requirement in that case being that he has reason to believe that a combine exists or is being formed.

The first stage in the proceedings ordinarily is a preliminary inquiry by the Commissioner. The Act does not define the limits of the preliminary inquiry but in practice it covers the assembling of such information as is necessary for the Commissioner to be able to determine whether further investigation leading to formal hearings and the preparation of a formal report is necessary or not. A preliminary study is made of the complaint, if one has been received, or other original information, by the Commissioner, usually in consultation with a Deputy or other member of his staff who may have special knowledge of the commodity or trade involved. Further steps may include interviews with the complainant if there is one or further correspondence with him in order to obtain additional information, correspondence or interviews with other persons in the trade or with government departments for the same purpose, and the collection and study of such secondary material as may be found in price lists, trade journals, published financial returns and data supplied by government departments.

The Commissioner then makes an assessment of the information so obtained and determines if further investigation is warranted.

If he is satisfied that the inquiry should be continued, the second stage is usually an examination of the business records of the firms and individuals believed to be parties to joint arrangements. The Commissioner details one or more of his staff to visit the premises, examine the records and select relevant documents. The latter are transferred to Ottawa for further examination and copying. After being photographically copied, the originals are returned, those in current use being separately handled and given priority of return.

If, after analysis and review of the material obtained in this way, a full investigation is considered justified, it is usual to ask for the appointment of counsel and the stage of oral hearings is entered upon. At the hearings officers and employees of the parties or associations whose activities are under investigation are called upon to give evidence, usually to explain and supplement the documentary evidence already in possession of the Commissioner. In some instances complainants or other parties affected by the alleged restrictive practices are also examined under oath at the hearings. The Act directs that the

proceedings be conducted in private unless otherwise ordered by the Commissioner; they are, as a rule, in private. However, witnesses are commonly attended by counsel who may put questions to them to amplify the evidence, or witnesses without counsel, may, in addition to replying to questions directed to them, supply such further information as they think has a bearing on the case.

At the request of the Commissioner, Commission counsel then prepares a statement reviewing the effect of the oral and documentary evidence in the investigation and indicating the facts, if any, constituting, in counsel's opinion, a violation of the Combines Investigation Act. The Commissioner then forwards the "allegations" to the parties as constituting the case against them in order that they may make representations as to why a report should not be made against them. At the same time they are notified that in compliance with section 13 of the Inquiries Act which is made applicable to proceedings under the Combines Investigation Act they will be allowed opportunity to be heard either in person or by counsel before the Commissioner and that representations may be made either orally or in writing.

The proceedings culminate, after such a hearing, in the report of the Commissioner, which when completed has to be transmitted to the Minister of Justice, by whom it is to be published within fifteen days unless the Commissioner recommends against publication upon the grounds of public interest in which event the Minister may decide whether or not to publish it, either in whole or in part.

On receipt of a report indicating an offence against the Act or the Criminal Code, the Minister (or the Attorney-General of a province within which the alleged offence was committed) decides whether or not a prosecution should be launched.

In addition to the principal functions outlined above, the Commissioner may receive complaints in respect of practices alleged to be offences under the Act or sections 498 or 498A of the Criminal Code. In such cases, if preliminary investigation indicates a case for consideration of immediate prosecution, the Commissioner can forward the evidence at once to the prosecuting authorities for such consideration.

C. *The American Legislation*

The growth of restrictive and quasi-monopolistic industrial activities in the United States in the late seventies and early eighties of the nineteenth century aroused a concern in the popular mind that was soon reflected in legislation. The Interstate Commerce Act of 1887, for example, prohibited pooling arrangements among carriers. In the same and succeeding years state legislatures enacted laws prohibiting restrictive and monopolistic practices. Although almost all of the states eventually adopted similar legislation it became apparent at an early date that the dominantly interstate character of trade and commerce called for federal legislation on the subject. This took the form of the Sherman Anti-Trust Act of 1890.

The constitutional base for this, as well as the subsequent anti-trust legislation, is the "commerce clause" of the Constitution, giving Congress power over commerce between states and with foreign countries.

The two principal provisions of the Sherman Act are:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

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Although in literal terms the Act makes every combination in restraint of trade illegal, it has been interpreted by the courts as prohibiting unreasonable restraints only. The protection of the public interest in free competition has been the basis for interpreting the legislation. This view has resulted in certain specific trade practices such as price-fixing by associations of manufacturers or distributors being held to be illegal *per se*. Again, although the language of the Act is general in prohibiting every person from monopolizing or attempting to monopolize or conspiring or combining to monopolize any part of interstate or foreign commerce, not every type of monopolistic activity has been held to be illegal. Such things as the power to exclude competitors and intention to monopolize, the degree of control exercised by the monopoly in the industry and the effect of any integration of units upon competition are considered in determining the question of whether or not an offence has been committed.

The Sherman Act is administered by the Anti-Trust Division of the Department of Justice. In addition to the penalty of a fine of $5,000 or imprisonment for not more than one year for a violation of the Act, the legislation also empowers the Attorney-General of the United States to bring civil proceedings to enjoin violations of the Act. This procedure has been actively used both to restrain the doing of specific acts in combination and also to break up large monopolistic units into smaller units. A third sanction is the provision that any person injured in his business or property as a result of a violation of the Act may sue in the civil courts to recover three times the damages sustained by him, the so-called "treble-damage action".

There were no amendments to the Sherman Act until 1937, but various supplementary acts were passed prior to that time in an effort to remedy deficiencies and eliminate possible methods of evasion, as well as to provide additional sanctions to encourage compliance with its provisions.

The most important of these were the Clayton Act and the Federal Trade Commission Act of 1914.

The principal provisions of the Clayton Act deal with price discrimination, exclusive dealing arrangements, and mergers. Section 2 of the Clayton Act, as originally passed, and now replaced by new legislation, was limited almost entirely to direct discrimination involving discounts from and allowances against list prices. Section 3 of the Act specifically prohibits the sale of goods or the fixing of any price or discount on condition that the purchaser not deal in goods of a competitor of the seller, where the effect may be to lessen competition substantially or tend to create a monopoly in any line of commerce.

Section 7 prohibits a corporation engaged in commerce from acquiring the whole or part of the capital stock of another, either directly or indirectly, where there may be an adverse effect upon competition. This section, it was found however, could be avoided by the device of purchasing the assets of a company rather than the capital stock. An amendment designed to prevent this avoidance became law on December 29, 1950.

The Clayton Act creates no criminal offences. The specific restrictive practices prohibited are simply declared to be unlawful. The Federal Trade Commission, which was established by the Federal Trade Commission Act in 1914 and is a board consisting of five members, administers the legislation. The Commission has power, after conducting an investigation, to order any person found to be violating the Act to cease and desist from such violation. Penalties may then be invoked for failure to comply with the terms of a cease and desist order.

The Anti-Trust Division of the Department of Justice has concurrent jurisdiction with the Federal Trade Commission in that it can institute court proceedings for an order to restrain violations of the Clayton Act. Like the Sherman Act, the Clayton Act provides for a private action for treble damages.

Section 5 of the Federal Trade Commission Act declares unfair methods of competition and unfair or deceptive acts or practices in commerce to be unlawful. The Commission is empowered to issue cease and desist orders in respect of these practices as in the case of prohibited practices under the Clayton Act. The area of operation of the Commission in this field includes such practices as false and misleading advertising and labelling, and a variety of restrictive practices.

Section 2 of the Clayton Act did not, however, succeed in halting many types of discrimination and the Robinson-Patman Act of 1936, of which section 1 replaced section 2 of the Clayton Act of 1914, was enacted to cure the weaknesses that had been observed in section 2 by furnishing general guides to the validity of any discount or allowance. The present section 2 of the Clayton Act (section 1 of the Robinson-Patman Act) prohibits, among other things, the granting of different prices to different purchasers of goods of like grade and quality where the effect may be to lessen competition substantially or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. Differentials that make only due allowance for differences in the cost of manufacture, sale or delivery resulting from different methods of sale or handling and quantities delivered are permitted.

There are several specific statutory exceptions to the operation of the anti-trust laws in the United States. Among the more important of these is the Webb-Pomerene or Export Trade Association Act which was passed in 1912. It authorizes the organization and operation of export trade associations and extends to them certain limited exemptions from the anti-trust laws provided they have been entered into for the sole purpose of engaging in export trade and do not restrain the trade of a domestic competitor or restrain trade within the United States.

The Miller-Tydings Amendment to the Sherman Act passed in 1937 legalizes resale price maintenance agreements under certain circumstances provided the state in which the goods are to be resold has enabling legislation.

The Reed-Bulwinkle Act 1948 exempts common carriers from the operation of the anti-trust laws where their agreements to restrain competition have the sanction and approval of the Interstate Commerce Commission.

Various other Acts supplementary to the principal anti-trust laws have been passed from time to time but are of limited range and use. They include the Wilson Tariff Act of 1894, which prohibited, under penalty, combinations, conspiracies and other agreements in restraint of trade for the purpose of increasing the market price of imported articles between persons in the import trade, the Panama Canal Act of 1912 which barred anti-trust violators from the use of the Panama Canal, and the anti-dumping provisions of the Inland Revenue Act of 1916 which prohibited the dumping of foreign goods.

The administration of the United States legislation rests with two bodies—the Anti-Trust Division of the Department of Justice and the Federal Trade Commission. The former, charged with the enforcement of the Sherman Act, is part of the ordinary departmental structure of government. It has no special powers of investigation and administration. Unless it secures voluntary access to business records, it must resort to proceedings before a grand jury for that purpose. It does however have what amounts to a considerable measure of administrative responsibility in its choice of bringing either criminal or civil proceedings or, as sometimes happens, of bringing both at the same time. Furthermore, civil proceedings for an injunction frequently terminate in consent decrees and the working out of the terms of such decrees and their supervision in operation give the Division administrative latitude.

The principal anti-trust functions of the Federal Trade Commission are the administration of the Clayton Act and the Federal Trade Commission Act. The Clayton Act, as pointed out above, deals with such matters as price discrimination, exclusive dealing contracts, and mergers, while section 5 of the Federal Trade Commission Act covers unfair methods of competition and unfair or deceptive acts or practices in commerce.

The legislation administered by the Federal Trade Commission being non-criminal in nature, the Commission does not operate as an ordinary law-enforcement agency as does the Anti-Trust Division. Its powers of investigation include the right of access to business papers and records, and the power to require production of documents and to examine witnesses upon oath. The Commission may launch proceedings either upon complaint or upon its own motion. The investigation is made by a field representative of the Commission, and upon his report the Commission decides whether or not further action is warranted.

Before a case comes before the commissioners by way of formal hearing, however, it may be disposed of by what is known as a stipulation to cease-and-desist, which is to be distinguished from a cease-and-desist order following a formal decision of the commissioners. The drafting of the stipulation is handled by Commission officers, and the proposed stipulation may be accepted or rejected by the parties involved. If it is rejected the case then goes forward to a formal hearing. Under the formal hearing procedure the investigation is first made by a trial Examiner who takes the evidence of witnesses and makes a report. Oral argument then takes place before the commissioners and their decision follows.

If the Commission decides that the law has been violated it is required to make a report in writing stating its findings of fact, and to issue a cease-and-desist order. The formal order and findings of fact are matters of public record.

Commission orders are not punitive for past misconduct although they are predicated upon a previous violation of the law. They usually require that the respondent abandon and refrain in the future from the unlawful practices in which he has engaged in the past. Any person against whom such a cease-and-desist order has been made pursuant to section 5 of the Federal Trade Commission Act may obtain a review of that order in the appropriate Circuit Court of Appeals, upon petition for review filed within sixty days of the date of the Commission's order, with further appeal being possible to the United States Supreme Court. Where there is a refusal to comply with a cease-and-desist order under the Clayton Act, the Federal Trade Commission applies to the appropriate Circuit Court of Appeals to confirm the Commission's order. If the order is confirmed, non-compliance thereafter constitutes contempt of court and appropriate sanctions are imposed. Failure to comply with a cease-and-desist order under the Federal Trade Commission Act can result in a fine of not more than $5,000 per day for each day of non-compliance.

There is some overlapping of functions between the Anti-Trust Division and the Federal Trade Commission. Although the principal activity of the former is to prosecute and restrain violations of the Sherman Act, it also has power to bring civil suits to restrain violations of the Clayton Act. The Federal Trade Commission operates as an administrative body which enforces the Clayton Act and Federal Trade Commission Act through cease-and-desist orders. However, under the interpretation given section 5 of the Federal Trade Commission Act, that section includes many practices which are usually deemed to be violations of the Sherman Act.

D. *The United Kingdom Legislation*

The Monopolies and Restrictive Practices (Inquiry and Control) Act, passed in July 1948, is the first legislative attempt within modern times in the United Kingdom to curb monopolistic and restrictive practices. The Act provides for the

investigation of monopolies and restrictive arrangements in trade and industry and confers special powers on government departments to cope with those that are found to be against the public interest.

The investigating agency is a Commission of four to ten members appointed by the Board of Trade. It acts on references made to it by the Board. The references may be of two kinds.

On the one hand the Commission may be required to confine its activities to a factual survey to determine whether or not certain conditions, defined by the Act, exist in a trade or industry. These conditions are present if a third or more of the goods in question is supplied, bought or processed either by one person or by two or more persons being inter-connected bodies corporate or who have a tacit or expressed agreement to limit competition in any way in the particular trade. The conditions are also present with respect to the export of goods from the United Kingdom if any one person produces at least one-third of all goods of that description produced in the United Kingdom, or if any agreements are in existence which have the effect of preventing or restricting competition in the export of those goods generally or to any particular market and the agreement is operative with respect to at least one-third of the goods of that description produced in the United Kingdom.

On the other hand the Commission may have a much wider range of inquiry, and, in addition to a purely factual survey, be asked to say whether, in its view, the conditions disclosed "operate or may be expected to operate against the public interest".

Furthermore, when requested by the Board, the Commission may make general studies on specified trade practices.

Bearing on the question of public interest, the Act sets out certain criteria as a guide to the Commission. The Commission is directed to have regard to the need, consistent with the overall economic position of the United Kingdom, to achieve a production and distribution at prices that will best meet the requirements of home and overseas markets, to promote efficiency in industry and trade and the encouragement of new enterprises, to achieve the fullest use and best distribution of men, materials and industrial capacity and to develop technical improvements and existing and future markets.

The Commission reports to the Board of Trade. The Board has a discretion to allow or withhold the publication of reports that are of a purely factual nature: if the report also relates to the effect of the practices under investigation on the public interest, the Board must lay it before both Houses of Parliament unless the Board decides that publication would be contrary to the public interest or would disclose some secret process or trade information that would damage a legitimate business interest; in such cases, the Board may withhold publication or publish an abridged version.

No offences are created by the Act or practices declared illegal. The remedial action that may be taken is of a Ministerial nature. Designated Ministers are given power to issue orders, subject to affirmative parliamentary resolution. The orders may, among other things, prohibit the making and carrying out of agreements, and may expressely forbid boycott, conditional sales and preferential terms.

In the case of a violation of an order made under the Act it is open to the Crown or to any person affected to bring civil proceedings in the courts for an injunction preventing further disobedience or for other appropriate relief.

E. *Comparison of Legislation*

It is clear that there is a marked difference of approach to the monopoly problem on either side of the Atlantic. In this country and in the United States monopolies are proscribed by general legislation and their formation or operation is made a criminal offence. Great Britain, on the contrary, has shared for

a long time the European toleration of monopolistic arrangements in trade and industry. The 1948 Act accordingly begins at a very different point from ours or the American. While the latter legislation serves to maintain the competitive structure of the economy by declaring arrangements which conflict with this purpose unlawful, the British Act is neutral towards monopolies and restrictive practices. It treats them as neither good nor evil in themselves. They become subject to government intervention only when they are found, after examination in each individual instance, to operate in opposition to what is considered to be over-all national policy. That policy, in turn, is defined largely as one of maximizing the national output of goods and services. It is performance of this sort which is given priority of place and business conduct which measures up to this standard will be within the public interest.

This purpose determines the character of the legislation and the machinery of control which it uses.

Like the Canadian, it establishes in the first instance an agency of investigation, a Commission of a non-departmental nature, though less independent of departmental supervision than ours in that the Board of Trade alone may initiate investigations and determine their scope. Both Acts provide for a report of particular investigations and for its publication; and both confer on the Commission power to make general or industry studies.

The Federal Trade Commission in the United States has in many respects comparable procedures but its activities are largely limited to the field of discriminatory and unfair trade practices. The principal anti-trust agency, the Anti-Trust Division of the Department of Justice, while it performs many of the same functions as the Canadian and British Commissions, does so on a departmental basis and is without special powers either of investigation (its use in criminal cases of grand jury proceedings substitutes to some extent for them) or of report.

But beyond the stage of investigation the United Kingdom legislation (save for an observation to be made later) ceases to resemble the Canadian. It creates no offences (other than disobedience of orders issued under the Act) and makes no monopolistic practices illegal. On the contrary, it leaves each case to be dealt with at large by Ministerial order. The plain intention is that the techniques of monopoly control should be meshed in with current national policy, and the remedies accordingly are part of the political or legislative arm of government rather than, as with us and the Americans, principally a part of the judicial process. This is the most distinctive feature of the British legislation, and also in many respects its most significant one. At the same time it should be observed that Great Britain is a unitary state and the Parliament of the United Kingdom is not subject to constitutional limitations such as control the action both of Parliament in Canada and Congress in the United States.

The American legislation differs from the Canadian by providing civil remedies in addition to criminal ones. The Federal Trade Commission may issue cease-and-desist orders as part of it procedure in administering the legislation against discriminatory and unfair trade practices; they are indeed its principal means of enforcement. The Anti-Trust Division, in cases falling within the Sherman Act, may apply for a judicial injunction to restrain a violation of that Act. This may be either in connection with criminal proceedings taken at the same time, or independently and without resort to prosecution.

In the matter of further remedies, the calling in aid for this purpose of the executive power of government, which is so much a feature of the British Act, is not without parallel in our own Act. The authority given to the Governor in Council to reduce customs duties in industries or trades where a combine has been found to exist, and to the Attorney-General to launch proceedings for the abrogation of patent rights has a long, if inactive, history in our legislation. In no significant way, however, is the grant of executive power as ample as it is in the 1948 British Act.

II. ECONOMIC BACKGROUND TO MONOPOLY PROBLEMS

In the historical review of legislation, which has been given, the constitutional limitations of federal anti-monopoly legislation have been made clear. The pattern of the legislation itself reveals something of the philosophy behind it. It is now necessary to say something of the basis of government intervention in this field and of the nature of the monopoly problem.

A. *Basis of Government Intervention in the Monopoly Field*

Government intervention in the monopoly field is sometimes interpreted as an unnecessary interference in private economic affairs. It is even viewed as a direct menace to our system of free enterprise, as a means of discouraging efficiency and as an artificial barrier to the introduction of modern methods of doing business. Such views, however, are based on a misconception of the justifications of a free-enterprise system.

We can speak of a system of free enterprise only in the sense that free enterprise plays an important or dominant role in the economic life of a country. There is not and never has been any economic system which has not been subject to government intervention. In our own economic system, however, despite government intervention at numerous points, there is a large area in which we rely on private initiative to organize economic life and carry on the processes of production and distribution to the satisfaction of the consumer. Government regulation and direction are minimized. Certain legal requirements must be complied with but the initiative rests with private persons.

The justification for maintaining such a system is the existence of an effective degree of competition. The desirable alternative to government control is competitive control, not private control. Effective competitive control requires the existence of large numbers of sellers and buyers so that no one exerts any observable influence on the market but is in fact controlled by it.

Mere freedom from government intervention does not ensure a system of free enterprise. The markets and those who buy and sell must be subject to competitive rule.

> "In summary, a private enterprise system is one in which individuals and groups of their own initiative voluntarily organize and direct economic activities. Such a system is always private and always free in the equivocal sense that the government does not assume direct responsibility for determining positively who shall produce this or that and when, how and where production shall take place. But a private enterprise system requires more than the absence of government coercion or control. It requires that no individuals or private groups in any field legally open to private enterprise shall subvert the system itself and injure society by exercising monopolistic power. Whenever private economic power becomes so concentrated that the decisions of a few individuals or groups can substantially determine investment, employment, output and price policies in whole branches of industry, then and there business enterprise ceases to be really free and it may even cease to be truly enterprising."[1]

Difficult decisions of public policy are required because competition is relative. Its mere presence is not enough. It must be present in sufficient degree. A diminution of competition is not necessarily disastrous if an effective degree remains. Any actual market situation has present in it elements both of monopoly and competition. One or the other may be preponderant. One or the other may be more persistent.

Under competitive conditions, once individuals and firms have decided to participate in economic life and to maximize their gains, they are not free to act as they please. Their individual action exerts a negligible influence on the

[1] Stocking and Watkins, *Monopoly and Free Enterprise*, Chap. 1, page 12.

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market, while market conditions determine almost entirely their policies. Indeed these conditions fix the cost and the volume of employment of the different factors of production, the structure of prices, the volume and the orientation of production, the size and the number of firms as well as the level of profits. Thus, competition is a system of social control. Where it exists, individuals and firms must accept the price of goods and services as determined by the multitude of individual transactions and as represented by market prices and they must adapt their policies accordingly. Then, a free enterprise system is not free in every sense of that word, since it must be submitted to a powerful system of controls represented by the competitive rule; it is free only in the sense that it is not directed and regulated by a system of public controls.

Moreover, competition, viewed as a controlling device, works in such a way that it promotes economic efficiency and general welfare. It operates through freedom of consumer choice and free play of the profit motive. Each individual chooses what goods and services he wishes to consume. His desires are met in the free market by other individuals who will fulfil the choices or decisions of consumers in return for a profit which they in turn use to satisfy their own desires. The free enterprise system has consumer's choice as the governor of production, distribution and exchange. If consumers want more of something they are willing to pay for it in money terms in the market. The increased demand bids up the price of the particular item and there will be a special profit to be made in producing it. Businessmen, seeing this potential profit, will begin producing more of this product. As output increases, the price will tend to fall back until the point is reached where just sufficient of these goods is being produced to satisfy consumer demand expressed in terms of the price consumers are willing to pay. Producers who can cover costs at this price will continue production at this volume, while others who cannot will leave the industry. Perhaps new producers, seeing that they can make a profit at this price level, will enter the industry and commence production. This price mechanism operating in a free market relates shifts in consumer demand or in the costs of producing different commodities to the pattern of production and consumption.

It is important to realize that competition will not necessarily or inevitably maintain itself. There are always important monopolistic elements in the economy and in trying to improve their position, they suppress competition. Monopoly feeds on itself. One monopolistic arrangement makes it difficult to avoid others. Only by a positive policy can an effective competitive system be maintained.

If a system predominantly of free enterprise is to be preserved, electorates and legislatures must be alert to foster competition and protect it from infringement. They must be both alert and resourceful in discouraging the spread of monopoly and in removing its support.

Though this is not sufficiently understood there is no serious disagreement about it. In the brief submitted to the Committee by the Canadian Manufacturers' Association views are expressed which agree substantially with what has been said above:

> ". . . The members of this Association have adhered to the belief that a system of economic enterprise that is free, private and individualistic is the foundation of our past achievements, our present high standard of living and economic prosperity and the best hope for rapid future development. This system, it is recognized, may be endangered either by undue government control or by undue industrial control. The operator of an individual firm may have his freedom of choice of what goods he will make, what technique of production he will use, what prices he will charge and what areas he will sell in, taken away from him just as effectively by an industrial combine or monopoly as by government edict. It is recognized, therefore, that some combines or anti-trust legislation is necessary."

B. *The Monopoly Problem*

Having explained the basis of government intervention in non-competitive situations, it is appropriate to set out at least in general terms, some salient aspects of the monopoly problem.

We are using the words "monopoly" and "monopolistic" as comprehensive terms. In the United States, the word "trust" is probably the most widely used and reference is currently made to "anti-trust legislation". In Canada, the word "combine" has been adopted in our legislation. This is probably due to the fact, that, in earlier years, our legislation was restricted to combinations and agreements, that is, arrangements involving several firms. However, the word "monopoly" has the advantage of being applicable to all aspects of the problem.

(1) *Definition of Monopoly*

Strictly speaking, pure monopoly is characterized by the complete control by one firm or by a group of related firms over the supply of a commodity for which there is no substitute. This strict condition, although useful as a first approximation to the economist in his abstract analysis, is not met in the real world. In a more concrete sense, monopoly power may be said to exist whenever the policy of a firm or of a group of related firms in respect to any condition regarding the supply of a commodity has a decisive influence on the market of that commodity. Thus, monopoly power is defined in terms of control over the market and its degree may vary from one case to the other. The market may be local, regional, national or international. Monopoly may also be characterized as the situation in which consumers have no choice of suppliers and are obliged to buy a product from one firm or from a group of related firms.

Although it is relatively easy to recognize a monopoly in a concrete case, it is very difficult to define it in general and quantitative terms. An enterprise may be the only firm in the country in a given industry and yet be subjected to active competition from close substitutes. On the other hand, a firm may share the national market for a product with others, and yet occupy a substantial monopoly position.

(2) *Division of the Monopoly Field*

The monopoly field is divided into two sectors which must be treated separately. First, there are monopolistic situations characterized by the existence and exercise of monopoly power. Second, there are monopolistic practices, which are methods used to gain or maintain monopoly power. Monopoly power may yield different results, but it is always arbitrary. On the other hand, monopolistic practices, apart from resulting in a departure from competition, have a significance of their own: they may be either desirable, undesirable or neutral. Two illustrations will be sufficient, at this stage, to show the significance of the distinction between monopolistic situations and monopolistic practices. There is nothing reprehensible in being efficient and yet a firm may attain a dominant position in its field through its natural growth and its economic efficiency. On the other hand, the "loss-leader" practice, which is aimed at strengthening the market position of a firm and at eliminating competition, may never lead to a monopolistic situation and yet badly injure rival firms. That is why it is necessary to analyse and appraise separately these two sectors of the monopoly field.

(3) *Forms of Monopolistic Situations: Trusts and Combinations*

Basically, there are two forms of monopolistic situations. First, there is the case where a single firm controls the supply of a commodity. The second form corresponds to the situations where two or more firms decide to follow a common

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policy in respect to one or several conditions affecting the supply of a commodity and when their combined action has a decisive influence on the market; in other words they act as if there were only one seller. The word "combination" is used as a general term to describe this second form of monopolistic situation which is achieved through some kind of agreement. The nature of combinations varies according to the terms of agreement. Any operation or group of operations related to the production or to the selling of a product may become the subject-matter of agreements. Thus, they may cover prices, production, market sharing, research expenditures, exchange of information on credit, costs, technological improvements and sales, methods of cost calculation and standardization of product. Several other types of joint activity could also be listed. It is evident that the effects and economic consequences of combinations will vary according to the nature and the extent of the combined activities.

(4) *Monopolistic Practices and Methods*

In turn, monopolistic practices or methods are so numerous and changing that they cannot be included in a complete and final list. Broadly speaking, they may be classified into two categories whether they are used to form and maintain a single firm monopoly or a combination or common policy among several firms. They are all designed to strengthen the market position of an individual firm or of a group of firms and they all indicate a departure from competitive behaviour even if they do not necessarily and directly lead to a monopoly situation. It must be emphasized that these methods are not always applied with the intention of achieving monopoly and they do not always and necessarily bring such result.

(a) *Monopolistic Practices and the Formation of Single Firm Monopolies*

There are two general ways for a firm to become a monopoly: it may just be alone in its field or eliminate its rivals. Numerous methods lead to each of these two ways.

A firm may be alone if it was the first to come into the field and if it has successfully avoided potential competition. Various conditions may give rise to that situation. The control over a scarce factor such as raw materials, electrical power, sources of capital or technological processes through patents or otherwise may lead to a monopoly position. For instance a mining company which owns all the known ore deposits in its field has a very effective monopoly. A firm may also be alone because the state of demand and the optimum conditions of production are such that there is no place for more than one producer. Finally, a supplier may be alone in the country where he is located and be protected from foreign competition by high tariffs or by an international cartel. Several trusts in Canada owe their present position to one or many conditions of this kind.

On the other hand, a firm can obtain a monopoly position through absorbing or eliminating its rivals. The various methods leading to such results can be classified into several categories.

First, there is natural growth through efficiency and direct investment in new facilities. Indeed, a firm may increase its share of the market and eliminate its rivals simply by being more efficient than they are. Good management, improvements in the quality of the product, sound advertising, the application of cost reducing devices accompanied by price reductions may all contribute to this result.

Second, a firm may gain monopoly power if it eliminates its rivals by buying them. This group of methods is called horizontal integration through complete or partial ownership. Mergers, amalgamation, interlocking directorships, common shareholders, holding companies all belong to this group and are probably the most effective and widespread devices used in the formation of trusts.

Third, vertical extension is another method designed to strengthen the market position of an individual firm. It may become a powerful adjunct of horizontal extension and it can be used to eliminate actual rivals as well as to prevent

potential competition. Vertical extension includes a group of devices enabling an individual firm to influence more than one stage of the transformation of a product. Among these various methods, vertical integration or vertical extension through ownership is probably the best known and is achieved through the formation of mergers, amalgamations, holding companies or through direct investment in new facilities.

Vertical extension aiming at increasing the influence of a firm on vital decisions normally taken independently by other firms can be achieved through various means other than ownership. A firm may through different kinds of contracts or arrangements impose upon its suppliers or its distributors certain types of behaviour designed to improve its market position and to injure its rivals. Among such arrangements, tying contracts, combination sales, full-line forcing, exclusive dealerships, requirements contracts, resale price maintenance and special rebates may be mentioned. Sales and purchase contracts of this kind make it more difficult for rivals to get their supplies at comparable prices and to find adequate outlets for their products. Some of these practices also contribute to eliminate competition in the field of distribution. Finally, advertising, which is a powerful means of influencing consumers and of forcing distributors to carry the products of a manufacturer on his own terms, can be used to extend the vertical and the horizontal scope of a firm as well as to reduce actual and potential competition.

Finally, there is a residual group of heterogeneous practices designed to eliminate actual or potential competition through injuring rivals. They are commonly referred to as "unfair practices."

Discrimination is probably the best known and the most widespread practice of this group. Generally speaking, it consists in treating similar customers differently and can be used by a supplier to increase its share of the market or can be forced upon the seller by powerful buyers who, in turn, can use the advantageous conditions thus obtained to achieve a dominant position in their own sector. Discrimination takes various forms. Non-price discrimination may cover the quality of the product or service. On the other hand, price discrimination may be quantitative (quantity discounts), spatial (freight equalization, freight allowance, zoning or basing-point systems), temporal or according to product use.

Other more injuring practices can be listed such as: derogatory and harassing practices, price wars, "loss-leaders", threats and spreading of false information.

(b) *Monopolistic Methods and the Formation of Combinations*

There is another general method leading to monopoly and that is the formation of a combination through which rivals, instead of fighting to eliminate each other, choose to agree among themselves to follow a common policy.

There are various types of agreements resulting in the formation of a combination. Some of them are described by Professor Machlup as follows:

> "A covenant signed with blood, an agreement signed with ink, an understanding without written words, concerted acts approved with a wink or a nod, a common course of action followed without physical communication, those may be different methods of collusion, but the differences are irrelevant if the effects are the same."[1]

The most elusive form of agreement is called "conscious parallelism". It exists when a group of firms decide to follow a common course of action without physical communication and it merely consists in imitating a rival's policy. With this type of arrangement, the firm which initiates the policy changes is not always the same one and the adoption of the new policy by rivals always takes some time so that it is very difficult to make the distinction between

[1] Machlup F., "What's Best for the Competitive Enterprise System?" in *Delivered Pricing and the Future of American Business*, Wash., 1948.

this kind of agreement and independent action designed to meet competition. Of course, to be effective, conscious parallelism requires a very small number of firms in the industry.

Price leadership is a more elaborate and permanent arrangement than conscious parallelism, although its only new feature is that a leader is accepted by the group. A. R. Burns gives the following account of this monopolistic method:

> "Price leadership exists when the price at which most of the units in an industry offer to sell is determined by adopting the price announced by one of their number . . . There may be departures from leadership, strictly defined, in that other firms may not always change their price simultaneously with the changes announced by the large unit or they may even occasionally initiate changes in price. The mantle of leadership may pass from the shoulders of one firm to those of another. There may also be narrow limits to the policy a leader can pursue if he is to remain a leader . . . Leadership would be expected to fall to the largest firm in an industry where there is any leader at all. The largest unit has the greatest interest in preventing price cutting. It is likely to be most able to enforce its policy upon others because it is likely to command the greatest amount of unused productive capacity and financial resources. Rivals are, moreover, likely to regard the large unit as better equipped than themselves to frame a satisfactory policy for the whole industry."[1]

Price leadership is a very useful device because it does not require an explicit agreement or physical communication among rivals. It may be decided as a matter of traditional and regular policy and independently by each firm. Leadership may even be imposed upon one firm without its consent, if others merely decide to follow its policy.

Price leadership is most likely to arise in those industries where one firm is large in comparison with the others. It is almost an inevitable outcome of such a situation. It has been observed that the control of 40 to 60 per cent of the production in an industry is enough to induce competitors to follow the prices of the large unit. Thus leadership is almost synonymous with dominance and bigness.

Finally, it must be noted that the practices described in the previous section as conducive to the formation of trusts, may be used much more effectively by a firm to attain a dominant position and to establish itself as the leader in its field, which amounts to the creation of a combination.

The formation of a trade association can also be used to arrive at a combination. Usually they are composed of competitors and they are aimed at the protection of their members. Trade associations are normally asked to provide certain services to their members, such as research, public relations as well as information and they may also be given the power to control or to determine the production and price policy for the industry. The monopolistic activities of trade associations may even be more important than their educational activities as it is shown in the following quotation:

> "Thus the editor of a leading trade journal reports that two of the most frequently discussed subjects at the many trade associations meetings which he has attended are (1) 'price-fixing' and (2) how 'to keep competition out or new competitors from starting'."[2]

Finally, direct collusion among competitors is another means to achieve a combination. It can take many institutional forms. Telephone calls and oral discussions at occasional meetings may be used. However, the most elaborate

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[1] A. R. Burns, *The Decline of Competition*, pp. 76, 77.
[2] Mund, V., *Government and Business*, p. 112.

form of collusion is the cartel which requires a written agreement and which is often complemented by such pricing practices as systems of freight equalization, basing-point systems, uniform delivered prices and open pricing.

C. *Conclusion*

As it can be seen, the monopoly problem takes many forms, is highly complex and requires continuous and careful examination. It is our conclusion then that continued government intervention in this field is not only justifiable but essential. Competition, on which freedom within the economy is based, will not persist without active support in law and administration. Private monopolistic control which cannot be completely eliminated must be restrained and subjected to public review. The measures taken must be adaptable to complex and rapidly changing problems. They must have built into them possibilities of growth and development.

III. FINDINGS AND RECOMMENDATIONS

It has been assumed in our inquiry that this country is committed to a system of economic organization predominantly of free enterprise. Many of the virtues of free enterprise are confined, however, as it has been shown in a previous part of this report, to free and effectively competitive enterprise. They are much more restricted when the enterprise is a monopoly or monopolistic. Only where competition is an effective control enforcing readjustment and change can the State stand completely aside and leave enterprise free. Only where the actions of the producers and sellers are controlled and directed by the market and where the producers and sellers (or buyers) do not control and direct the market is the State disinterested. These considerations summarize our views as to the need and basis of anti-monopoly legislation and administration.

We have also attempted in a previous section to define the monopoly problem and to describe briefly the various monopolistic situations and practices. It can be readily deduced from this analysis that neither competition nor monopoly are absolute conditions. The economist makes valuable analytic use of hypothetical assumptions of perfect competition and perfect monopoly. They have, however, no descriptive value as monopoly and competition are mingled in most complex ways in all real market situations. Location, custom, brand recognition, patents, ownership of scarce resources, efficiency, innovation, public relations—these and many other factors modify competition and create monopoly positions.

In a great many cases, however, the margin within which monopoly power can be exercised is narrowly restricted. We will prefer to buy our morning paper from the store at the corner and to buy a radio with a well-known name on it, but only so long as the conditions of sale do not vary significantly from those of other sellers. In a great many other cases, the monopoly power is restricted and temporary. The maker of a new device or the producer of a standard product who has found new and cheaper ways of making it has for the time being a preferred and monopoly position, but unless it is legally maintained by a patent or otherwise artificially protected, it may fairly quickly dissolve as competitors find equally good devices or equally efficient methods. Economic progress proceeds by the creation of monopoly positions by the alert and resourceful businessman who gets ahead of his competitors but who, if he rests on his achievement, finds his monopoly power dissolved as competitors overtake or pass him. It is then impossible to imagine a private enterprise system where a certain degree of monopoly power would not exist at least temporarily, since the rise of such power constitutes the very condition of economic evolution and progress.

From the point of view of social control and policy, we are particularly concerned with situations in which substantial monopoly power is of relatively long duration and can be exercised within significant margins to exact unnecessarily high prices from the public, to delay improvements, to shelter inefficiency or to endanger political democracy.

With this economic background in mind, we have examined the Canadian solutions—both past and present—to the monopoly problem. In our country, certain monopoly positions are controlled by government operation or public regulation. In the rest of the field, which includes by far the most important portion of the economy, the government is relying on its monopoly policy to maintain satisfactory competitive conditions. Indeed, as it has been already pointed out, the purpose of Canadian policy, up to the present, has consisted in maintaining competition. This we think should continue to be the purpose of our policy.

We are not unaware, of course, that there are sectors of the economy in which effective competition is not maintained, leaving problems which in a unitary state might be met by civil restraint or other remedies. It may be that at some future date it will be possible to extend the scope of the legislation. For the present, however, we think that its direction is right.

With those considerations in mind, we have proceeded to a close examination of the procedures and methods of our combines legislation and we have come to the conclusion that certain changes are desirable. On the whole, however, we think that the procedures which have been built up under the Combines Investigation Act are the right ones, involving as they do the examination of successive cases and publication of the facts, analysis and conclusions. Our recommendations are directed to the strengthening and improving of the procedures, organization and remedies laid down in the Act rather than to revolutionizing them. One of our main concerns has also been to strengthen the dynamic and flexible features of the procedures and of the organization in order to facilitate the adaptation of our monopoly policy to the ever-changing character of the problem that it is designed to solve.

Our findings and recommendations will be presented under three separate headings dealing with administration, remedies and general topics where different questions not necessarily related to each other will be discussed.

A. *Administration*

(1) *Separation of Functions*

There are three distinct procedural stages contemplated by the legislation—first, investigation; second, appraisal; and third, judicial, legislative and executive action. The latter is assigned to separate agencies; the former two are united in one official.

This union of functions is, in our opinion, a basic weakness of the legislation. It is neither right in principle nor sound administratively. Its effect is to place the Commissioner, on whom disparate duties are cast, in an equivocal position.

As investigator, his duties are explicitly marked out by the Act. In the first place he has to determine the over-all policy that should govern the operation of the Commission, select the parts of the economy and the industries within it that should be subject to investigation and the methods by which the investigation should be carried out. The history of the legislation, both here and abroad, shows that initiative and drive must be supplied to make an anti-monopolistic programme effective.

Our present machinery is well developed to meet this need and we have been particularly well served in its administration. It does, however, require close supervision by its directing head at all points. The powers of initiation and investigation are extensive and require a careful and continuous check on their exercise. The Commissioner has to be in close touch with the conduct of an investigation from the very beginning to see on the one hand that the powers are being used effectively and on the other that they are not being abused.

It is he who in practice first puts the machinery in motion. Very few investigations originate at the instance either of private citizens or of the Minister. The close association of the Commissioner with the investigation continues throughout its course. In the preliminary stages he must make the inquiry that determines whether a full scale investigation shall proceed under his direction. If this is entered upon he has the general supervision of the work of investigation which follows and which, to be effective, has to be conducted with alertness and zeal.

When an investigation is completed, the Commisisoner is required by the Act to assume an entirely different and an incongruous role. He must make an appraisal, intended to be public in nearly all cases, of the situation which has been brought to light by the investigation carried out at his instance and under his direction. He is given the compromising appearance of being "at one and the same time prosecutor and judge". No matter how fully his assessment of a situation may be justified by results, its value is lessened by the inconstancy of his position.

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Many of the criticisms we received about the present procedures and the report turned on this point. It is important that the Act receive the widest possible public support. There seems to be no valid criticism of the fairness or the vigour of the administration of the Act but as long as a single official is placed in the position of being required to perform incompatible functions there is room for a good deal of public misunderstanding. Furthermore, a separation of the two functions of investigation and appraisal would effect a logical, efficient and economical division of work. The burden of work now falling on the Commissioner is a considerable one which is increasing as the business of the country grows rapidly. Most investigations, because of the great volume of documents and other evidence, are lengthy and the preparation of a report necessarily time consuming. Our study has convinced us that it is already impossible for one man to keep abreast of the work. The preparation of a report of the wider nature we propose later will require more time for consideration and study than the present one does and we do not see how this can be done satisfactorily by anyone who has also the responsibility for running a busy office.

We refer in another part of our report to the need for undertaking research projects and other general studies bearing on the monopoly problem. The choice of subjects for research, the organization of personnel to carry the studies out and the planning and oversight of their production will require a good deal of time and attention. This is an additional reason why there should be a division of work and that of reporting separated from the others.

We propose, therefore, that the functions of investigation and research should be separated from those of appraisal and report.

How best to effect this separation is a question that the Committee has found its principal difficulty. In our opinion the answer lies in the direction already taken, in part, by the legislation. Prosecution and the application of the remedies of tariff and patent action are the task, under the Act, not of the Commissioner but of separate executive and judicial agencies which possess distinctive competence in those fields. The respective roles of the Commissioner and the other agencies are clearly marked out by this external separation and they have not lent themselves to criticism.

The contrary has been the case, as already observed, with the procedure leading up to the report of the Commissioner and the report itself. The dual position which the Commissioner occupies gives a certain plausibility to the criticism, however ill or well founded it may be, that the parties are pre-judged before having the right to a trial in the ordinary way. It contributes also to the tendency to look upon the report merely as the first step in a prosecution and not to have a value of its own.

The more clearly the source of the report can be detached from the machinery of investigation the more likely it is that the atmosphere of controversy which the dualism fosters will disappear.

It would seem advisable to make a clean, organizational break between the functions of investigation and research and of appraisal and report, and to make it manifest that confusion of the two functions cannot occur.

Administratively a certain gain in efficiency would be possible by such a division. The directing head would be free to press investigations forward without having to engage his energies in the prolonged work of reporting; the latter, on the other hand, could proceed without the interruptions that must otherwise occur.

Furthermore, this separation accords with the tradition of the legislation. When the Act took form in 1923 its design pointed to an extensive use of special or *ad hoc*, commissioners to conduct investigations. In the early years this was common practice. The appointment of a permanent Commissioner in 1937 increased the effectiveness of the procedure of investigation. But it created an

ambiguity of function which should be removed without the handicap of proceeding under temporary commissioners. In other words, machinery should be set up which will preserve the initiative necessary for investigation and at the same time recapture the separation of functions which the original Act contemplated.

We recommend that the present duties of the Commissioner should be divided and assigned to two separate agencies—an agency for investigation and research and a board for appraisal and report.

For convenience we will use the terms "agency" and "board" respectively to describe the two organizations.

(2) *Investigation and Research Agency*

The activities of the agency would include both investigation and research.

(a) *Investigation*

As to investigations the functions and powers of the agency in this field should be (subject to one change noted below) as they are at present.

(i) *Initiation of investigations*

We have received a good many representations that the power of the Commissioner to initiate investigations should be done away with altogether or, alternatively, exercised only after Ministerial approval has been obtained. The Act, it will be recalled, allows the Commissioner to launch an investigation "whenever he has reason to believe that a combine exists or is being formed". The independent power of initiation originated in 1919 when the Board of Commerce was given it by the legislation of that year; in 1923 it was vested in the Registrar and in 1935 it was conferred on the Dominion Trade and Industry Commission; and save for a period between 1937 and 1946 (during the bulk of which period wartime controls operated) it has been an integral part of the legislation. The Committee has not been furnished with examples of its abuse. The power, as observed earlier, is the means by which nearly all investigations in Canada have begun, and long experience seems to make it quite clear that the Act would be seriously weakened if the investigating agency were deprived of it. The selection of industries which should be investigated depends in large part on the constant observation of prices and other market phenomena and the accumulation of trade information over long periods of time. This means that, generally speaking, only an official or an organization having day-to-day contact with the situation is in a position to assess the need for action in specific cases. The power of the Minister or of six private citizens to originate action is a salutary residual one, but as a practical matter it cannot replace the other. The latter should continue with the investigating agency.

The existence of a board to pass finally on the results of an investigation supplies, in any case, a check, if one is needed, on the exercise of the power. With this safeguard the initiative in investigations should rest with the agency. The board should have no part in starting investigations. It should have an independent and impartial position.

(ii) *Powers of entry and examination of witnesses*

A further check on the power of the investigating agency can be applied by giving the board power to authorize entry and examination of premises and records and the examination of witnesses. This would be on *ex parte* application by the agency. Proceedings of this nature are a familiar and well established part of court procedure. The board would be an administrative and not a judicial body but in the present respect the analogy is sufficiently close that this procedure would be a proper one to adopt. The board in any case would have to be approached to fix the time and place for the hearing of oral evidence. Accordingly, there would be no loss in momentum by requiring the agency to

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seek permission to examine; and if application is to be made for the calling of witnesses it would be an anomaly not to have the same pre-requisite for the examination of records. To forward the work of research referred to elsewhere we consider that the agency on similar application to the board should have the power to require persons to supply information relevant to research into monopolistic situations and practices.

(iii) *Presentation of evidence*

On completion of an investigation, the agency would have the duty of presenting the results to the board for review and appraisal. At the hearings, the agency would represent the public interest by seeing that all proper representations, from this point of view, were made.

At this stage the matter would pass into the hands of the board and away from the agency. Later, however, the members of the staff of the agency and its directing head would be available for advice and assistance if it were sought by the prosecuting authorities or by the other executive and departmental branches of Government in cases where remedial action other than prosecution was being considered or taken.

(b) *Research*

In another part of this report we point out that a more extensive programme of research into monopolistic problems should be carried out than has been possible in the past. The agency should have a division specifically set up to do this work and it should be suitably staffed. Members of the staff would be interchangeable by internal arrangement with members of the investigation division. This would allow administrative flexibility to use staff resources to the best advantage as the demands of the work varied. It would also permit a desirable cross-fertilization of experience and background.

The board which we propose would also be concerned, as occasion suggested, with research into the general effects of situations and practices and would wish to have projects go forward. Its interest in research would, however, not be as sustained as that of the agency. The latter would keep business conditions under daily observation as the necessary adjunct to its duties of investigation, especially those of initiation. Furthermore, we do not contemplate that the board will need more than a small clerical and secretarial staff. We propose therefore that research should be placed with the agency but it should be possible for the board to draw on the resources of the agency and for this purpose it should have the power in this respect, which we detail later in this report, to call on the agency.

From time to time the Government also will no doubt wish that research be undertaken and a power similar to that of the board should rest with the Minister.

We recommend:

1. That there should be an investigation and research agency.
2. The agency should be composed of two divisions—the investigation division and the research division.
3. That the agency should have the same functions and powers as the Commissioner has under the present Act except that:
   (a) Its functions should be:
      (i) To conduct the investigations under the Act;
      (ii) To present the results of its investigation before the board;
      (iii) Upon the request of the Minister or of the board or on its own initiative to compile information and conduct general or specific research projects concerning the existence and the effects of monopolistic situations and practices;
      (iv) To present the results of its studies to the board.

(b) The power to enter and examine premises and records and to call witnesses should be on application made *ex parte* to the board.

(c) The agency on *ex parte* application to and approval of the board should have the power to require persons to supply information relevant to research into monopoly situations and practices.

(3) *The Board*

One principal function of the board would be to carry out the duties of hearing and report which are now vested in the Commissioner.

(a) *Hearings*

After the documentary evidence had been placed before it the board would proceed to hear the oral evidence that the agency sought to adduce. We recommend no change in the Act which directs that these proceedings are to be in private unless otherwise ordered, except that the order, if one were made, would be an order of the board. In accordance with this requirement the practice presently followed, of hearing the evidence of the witnesses from one company or firm without other persons being present, where necessary to protect the business interests of such company or firm, would continue. This privacy is in the interest of fairness to parties under investigation.

Before reporting the board would hold hearings at which parties under investigation would be heard: similar provisions to those now governing hearings before the Commissioner would apply. By Section 13 of the Inquiries Act, which applies to proceedings under the Combines Investigation Act, no report "shall be made against any person until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard."

Some criticism has been voiced in the representations made to us that rights of parties under this provision are prejudiced by reason of their not having access to all the evidence which has been assembled prior to a hearing. It is sometimes the case that information is contained in the documentary evidence or is adduced when witnesses are examined, which relates, for instance, to one company's trade or other secrets and which in fairness should not be disclosed to another company. The experience with the legislation would however indicate that such cases are not likely to be frequent and that in any event such information will not often form an essential and controversial part of the case alleged against any of the parties under investigation to whom access to such evidence has not been allowed.

We are of opinion that, save in the exceptional cases where, for the protection of legitimate trade interests or for similar reason it is necessary to withhold evidence, the parties should be furnished in the allegations with the material and controversial evidence against them so that they may have opportunity to be heard with respect to it. No evidence should be used to substantiate a charge of misconduct alleged against any person unless that person shall first have had such opportunity. We understand that this is, in fact, the present practice.

This would be a matter of procedure to be worked out by the board and no amendment to the Act is required in this respect.

(b) *The Report*

Following the hearings, the board would prepare a report to be transmitted to the Minister and made public in the same manner as now required. Throughout the history of the Combines Investigation Act, the report, whether made by a special commissioner or by the Commissioner administering the Act, has been a central feature of the administration and great stress has been laid on the importance of public knowledge in this field.

We think that the report should retain its importance and that indeed its scope might be somewhat widened and its significance strengthened.

There has been some tendency for the report to become merely a preliminary stage in prosecution. This tendency should be checked. The report should review the evidence, set out the facts of the conditions or practices complained of and inform the Minister and the public as to how, in its opinion, the practices worked. Nothing that is helpful in understanding the conditions or practices or will contribute to the maintenance of competition and the lessening of monopoly should be excluded from the report. It should reach conclusions on whether or not competition has been restricted or lessened and whether in the opinion of the board the conditions or practices have operated or are likely to operate to the detriment of the public. The board should not, however, be required or expected to determine specifically whether or not, in its opinion, an offence has been committed.

We do not think the report should recommend prosecution or non-prosecution. This should be left to the Minister's decision on the basis of the report and such advice as he may seek. We consider that the report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted.

Though the sanction of criminal punishment will continue for constitutional and other reasons to be a primary method of enforcement, the Act provides other remedies of mere restricted application which have been little used and which are capable of much more vigorous use. There is provision that the Governor in Council may eliminate or modify the tariff treatment accorded to the products of firms which may have indulged in restrictive practices and provision to initiate judicial action to deal with cases of abuse of patents. Where competition has been restricted to the detriment of the public, it is surely appropriate, if practical, that by modification of patent, or tariff provisions more competition should be allowed in. There will be of course many cases in which these remedies are inappropriate. Where they are appropriate, however, they will be much more positive in their effect than criminal penalties. The possibility of their use will have a stronger and more persuasive deterrent influence.

We propose, therefore, it should be required that in each and every report it shall be stated whether these remedies would be effective and appropriate in the circumstances of the cases. We do not of course propose that the person or persons making the report should substitute themselves for those who advise the Government on tariff and patent matters. Having the report before it, the Government would seek such advice as it needed and act according to its judgment. It is intended that the report, on these matters, should put the Government in a position in which it would be necessary to act or explain why action would be inappropriate or ineffective.

There are many other areas of federal jurisdiction which, occasionally, will be relevant to the existence of monopolistic conditions and practices and which will form part of the background of particular cases. The board should be alert to point out in its report what these relationships are and, if possible, where changes in law and administration would, in its opinion, encourage competition or lessen tendencies toward monopolistic practices.

There will be frequent cases brought to the board in which it is not possible to reach clear-cut conclusions as to the effect of arrangements and practices on the public interest even though it is clear that substantial monopolistic powers exist. Their full nature may not be apparent. The period of operation may be too short. In any case prosecution is not likely to lead to any appropriate remedy. In such cases there should be place in the report for suspended judgment and statement of the board's intention to continue its interest and study of the case. We think it appropriate that the board should have power to require in such cases the submission to it of special and periodic information to enable it to assess more fully the practices and operations in the light of the purpose of the

Act. We do not think it unfair, that those who exercise substantial monopolistic powers, should be required from time to time to explain to a responsible public body operations and arrangements which may jeopardize the public interest.

(c) *Publication of the Report*

We recommend further that (except for the substitution of the board for the Commissioner) the present provisions governing publication of the report should continue. Publication has been a feature of the legislation throughout most of its history. The objections against it which have been put forward have been based on the claim that publication of an adverse report before the prosecution of persons named in it was tantamount to a prejudgment of their conduct and militated against a fair trial. The objections were in relation to the present procedures laid down by the Act and the changes that we are proposing will remove, we consider, any valid grounds that the criticism may have had. If Parliament, the executive and the public are to be put in possession of accurate information and the views of a competent body as to the measures that might be taken to supply effective remedies for monopolistic situations, the report should be freely accessible. Most prosecutions are before a judge sitting without a jury and, in the case where a jury is employed, the safeguards against prejudice are well-established. Apart from this aspect of the matter it is not unreasonable that conditions which appear to a competent body, especially a demonstrably independent one, to be harmful should be brought to public notice, even if prosecution later takes place.

(4) *Consideration of Studies and Legislative Changes*

A second function of the board would be in connection with the consideration and appraisal of studies conducted by the agency. Under the section on research we give our reason for suggesting this arrangement. It is mentioned here only for the sake of completeness and to stress that such studies will gain in standing if they form the subject of report and recommendation of an independent body. The same is true of recommendations for legislative change. The wider the range of remedial action grows the more likely is the need for periodic legislative review. It would be a natural function of the board to bring forward situations when legislative change in fields of federal action seems necessary.

(5) *Powers of the board*

(a) The board should have the powers of a commissioner under the Inquiries Act. The occasion may arise when the board will find it desirable to supplement the information that is submitted to it by the agency or by the parties. In the course of hearings before the board, new points may arise which the board considers should be further examined into. In making its appraisal of situations it should not be confined to the record brought before it. Unlike a court, it is not a judicial body determining the rights of individuals but an administrative agency which is a part of the legislative and executive structure of government. It is concerned with policy and with advice that may be given on questions of policy. In this sense, it is a standing commission of inquiry into monopoly situations and problems, and it should have the usual powers of such a commission under the general act.

(b) In addition, as the board is to take over the functions of hearing and report which now reside in the Commissioner, it will have to be given such of his powers as relate to the carrying out of these functions.

(c) The agency is, we propose, to carry on the work of research. To provide a desirable integration of functions in this field the board should have the power already indicated, to request the agency to compile information and to conduct general or specific research projects concerning the existence and effects of monopolistic situations and practices.

(6) *Composition of the board*

The functions of the board will be of the utmost importance to the country. The success or failure of the scheme which we propose will turn largely on how well the functions are performed. The problems coming before the board will be complex and exacting in many instances. We consider it proper to emphasize that the board should be composed of members chosen for their knowledge, skill and integrity and not as representatives of interested groups and that the members should be appointed for a tenure that will secure their independence.

In speaking of a board we have of course implied that it would be composed of several members. There are obvious advantages in drawing on the knowledge and judgment of more than one person. There should be power of delegation of duties and powers of the board except those of reporting to enable the board to dispose of its work with greater despatch than if it always acted as a single unit.

We are satisfied that when the board is in full operation there will be ample work for three persons, but we have no assurance that more than three members would be fully and usefully occupied. If in the initial stages it seems desirable that the functions of the board should be performed by a single member because suitable persons are not immediately available we see no serious objection to this as a temporary measure, though we consider that the full functioning of the board will require three members.

At times, the business of the board could be expedited by the appointment of one or more examiners to take oral evidence at convenient points across the country. The Federal Trade Commission in the United States makes use of such an arrangement with apparently satisfactory results. We recommend that the board should be in the position to apply as need arises to the Governor in Council for the appointment of examiners to assist it in this way and should have power accordingly.

We recommend:

1. That an administrative board should be established reporting to the Minister and composed of members chosen for their knowledge, skill and integrity and not as representatives of interested groups and appointed for a tenure that would secure their independence.

2. That the functions of the board should be:

   (*a*) To hear the oral evidence and to consider and appraise all evidence presented to it by the agency and such other evidence as may be necessary to ensure that persons under investigation shall have had full opportunity to be heard; and to report and make recommendations thereon.

   (*b*) To consider and appraise the results of studies conducted by the agency on monopolistic situations and practices and to report and make recommendations thereon.

   (*c*) Upon the request of the Minister or on its own initiative to inquire into and make recommendations from time to time for legislative changes.

3. That the board should have the powers of a commissioner under the Inquiries Act and such of the powers of the Commissioner under the present Combines Investigation Act as may be necessary to carrying out its functions.

   In addition, it should have power:

   (*a*) To request the agency to compile information and to conduct general or specific research projects concerning the existence and effects of monopolistic situations and practices.

(*b*) To require a firm or a group of firms to submit special or periodic reports in order to enable the board to assess its or their operations in the light of the purpose of the Act if, in the course of an investigation, the board finds that the firm or the group of firms exercises substantial monopolistic powers.

(*c*) To authorize any of its members to exercise the powers and perform the duties of the board except that of reporting.

4. That provision be made enabling the board to apply to the Governor in Council for the appointment of examiners to take oral evidence.

5. That the report should retain its importance and that its scope should be widened and its significance strengthened. It should review the evidence, appraise the conditions and practices under review and contain recommendations as to remedies including tariff and patent action and other government action. The existing provisions (except for the substitution of the board for the Commissioner) concerning the publication of the report should be continued.

B. *Remedies*

The remedies open for consideration are criminal prosecution, supplementary judicial remedies, tariffs, patents and other federal action. For present purposes we restrict our discussion to them and do not discuss the further remedies that might be available under other constitutional circumstances.

(1) *Criminal Prosecution*

(a) *Consolidation of Legislation*

The reasons for sections 498 and 498A of the Criminal Code and sections 2 and 32 of the Act taking separate existence are, in the main, historical and are traced in an earlier part of this report. In our opinion no injustice has resulted but there is some merit, on the grounds of convenience, in the suggestion that the legislation should be consolidated. Combines legislation is not static and the need for periodic review is an important feature of it. Such review may lead from time to time to necessary amendments being made, as experience with the working of the Act develops, and there would be certain drafting advantages in having the legislation in the one Act. We do not recommend, however, that any of the offences set forth in the Combines Investigation Act or in sections 498 and 498A of the Criminal Code be done away with. Our recommendation rather is that consideration be given to the transfer to the Combines Investigation Act of those parts of sections 498 and 498A of the Criminal Code which create offences not now contained in the Combines Investigation Act.

(b) *Definition of the Offences*

One of the complaints about the legislation is that it should make it necessary to prove a specific detriment to the public or, alternatively, an intention to do specific injury to the public in order to found a case for conviction. In other words it should be insufficient to demonstrate that competition has been lessened or eliminated over a substantial area of the trade; it should be necessary to proceed further and to show that as a result of such lessening or preventing of competition prices had been raised, quality had been lowered, choice had been unreasonably restricted, entry into a trade had been prevented or seriously hampered or some other specific detriment had in fact occurred or had been planned.

This criticism is often allied with the complaint that the law is uncertain. Paradoxically it points in exactly the opposite direction. It would make the law more uncertain than it is claimed to be.

It is, however, open to a much more fundamental objection. If the suggested requirement were added to the definition of the offences, it would emasculate the section. The function of the section is to define a crime so that judicial sanctions can be applied to offenders. It can only serve this purpose if it is capable of judicial use. The courts have been at pains to explain, not only that they are not required by the legislation to find specific detriment but that they would not be apt instruments to make such a finding. They lack the machinery and it is not their proper role to enter upon the very wide inquiry which would be needed if economic performance instead of the lessening of competition were the test. When efficiency has to be judged, administrative machinery such as public utility boards is the means which must be created for this purpose. Most combines cases have involved directly or indirectly the fixing of prices. A combine involves the elimination of competition over a substantial area of the trade. In other words, the very existence of the combine has usually served to eliminate all basis of comparison by which reasonableness, or the reverse, of the prices established by the combine can be measured. Then too, the price of one product is related to other prices, which fluctuate constantly, and nothing less than an elaborate machinery of examination can, for any given period of time, set a yardstick of reasonableness. Sometimes it is argued that some index such as the size of the profit in relation to gross value of sales or to invested capital should be employed. The fact that this profit is small may simply mean that the price has been fixed high enough to maintain the least efficient. This carries the inquiry to the point where a determination has to be made of the absolute efficiency of the operations of an industry. These are tasks which no court could perform under traditional procedures. In order to say whether the prices were reasonable or not, an interrelationship would have to be determined between such things as prices and dividends, prices and reserves, prices and wages and other emoluments.

The argument for the suggested change is therefore tantamount to saying that criminal sanctions should be abandoned, even in the sectors of the economy where the free operation of competition is the only protection that the public possesses. Therein lies its real weakness. There is no contest that there are sectors where competition can play no part, and where other means of public control have to be substituted for criminal prosecution. That however is very different from saying that in the sectors where competition should be maintained, crippling barriers should be erected against the use of the principal means of enforcement. This point, valid in other countries, is particularly pressing in Canada where constitutional restrictions condition so definitely the remedies that are available.

For the determination of legislative and executive policy, wider considerations of public interest including tests of efficiency are possible. It is contemplated that the board which we propose will be in a position to bring these considerations to bear on monopoly situations and practices.

(c) *Section 498A of the Criminal Code*

Paragraph (a) of this section was criticized in the representations we received. The section was enacted in 1935 as a result of the examination by the Royal Commission on Price Spreads into discriminatory practices. Its purpose, in part, is to prevent a powerful buyer in the field compelling, by reason only of his size, suppliers to give him preferred prices unrelated to any economies effected by quantity buying. The section purports to forbid any transaction of sale which discriminates among competitors by allowing a discount, rebate or allowance not available to other competitors from the same supplier of goods of like quality and quantity (paragraph (a)). It also prohibits the policy of selling goods in one area of Canada at prices which are lower than are charged by the same seller elsewhere in Canada for the purpose of destroying competition or eliminating competitors (paragraph (b)). Finally it bans the policy of selling

goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor (paragraph (c)). It was against paragraph (a) that the criticism was directed. It was said that the paragraph operated to prevent a supplier meeting spot competition by matching the price of a competitor. If a supplier has been selling to the trade at a certain price for a given quantity and a potential customer seeking a comparable quantity requests a better price from him because he can get such a better price from another supplier, then the first supplier may, it was argued, be prevented from meeting such spot competition by the operation of paragraph (a). It was said that the granting of a better price to a customer could be held to be discrimination against such other customers as may be competitors of the purchaser.

There has been no judicial interpretation to this effect but concern was expressed to us from a number of sources that this view might be taken of the paragraph.

We are of opinion that paragraph (a) is defective in being directed against a single transaction and that what should be forbidden is rather a course of action. This would allow a supplier freedom to meet spot competition while forbidding him to make it a practice to discriminate among his customers. We, therefore, recommend that paragraph (a) be re-drawn so as to make it clear that it is directed against a practice and not against a single transaction.

(d) *Section 1141 of the Criminal Code*

The question has arisen from time to time as to whether or not section 1141 applies to prosecutions under the Combines Investigation Act and section 498 of the Criminal Code. Section 1141 is as follows:

> "No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any act or by-law."

The legislative history of the section indicates that it was not intended to apply to criminal prosecutions generally but only to prosecutions under a penal statute where a portion of the penalty is payable to a common informer. The weight of judicial authority is that section 1141 does not apply to combines offences; but, to remove all doubt, we recommend that section 1141 be amended to make this clear.

(e) *Section 39A of the Combines Investigation Act*

This section was added to the Act in 1949; it has come under some criticism in the representations made to us.

Without this section the prosecution would, in many cases, encounter serious difficulty in proving matters essential to its case which lie wholly within the knowledge of the accused and are not accessible to the prosecution. It is modern business practice frequently to confer authority on officers and agents informally without written record or minute and it is to this circumstance that the amendment directs itself.

The effect of the amendment is to make relevant documents found in the possession or in the files of an accused admissible for the purpose of establishing a rebuttable presumption that the documents are authentic records from which a court or jury may draw reasonable inferences. It also establishes a rebuttable presumption that an employee acting in connection with his employer's business has authority so to act. The section does not shift the onus of disproving the offence to the accused as has been suggested in certain representations submitted to us. The evidence made available by the statutory presumptions is only *prima facie* evidence and is subject to rebuttal. The onus remains upon the Crown to show that the evidence as a whole establishes guilt beyond a reasonable doubt.

We are of opinion that much of the criticism of section 39A stems from a misconception of what it actually does and we believe that its present form should not be disturbed.

(f) *Jury Trial*

In 1949 the Combines Investigation Act was amended to provide that a corporation charged with an offence under the Act or under sections 498 or 498A of the Criminal Code should be tried by a judge without a jury. Certain representations made to us criticized this amendment. We consider, however, that the advantages of the non-jury trial in the case of corporations—to whom the principle of trial by one's peers plainly does not apply as it does in the case of individuals—outweigh any disadvantages that may exist. The trial of a combines offence involves considerations peculiar to the nature of the crime. To an unusual extent the evidence in these cases consists mainly of documents. The considerable volume of documentary evidence encountered in most of these cases and the complex nature of the case itself makes presentation before a jury less satisfactory than before a judge sitting alone. The length of a trial, often extending into many weeks, is such as to impose a heavy burden on a jury.

In a jury trial all the documentary evidence is ordinarily read to the jury *in extenso* during the court hearings which, of course, lengthens the proceedings considerably. In a non-jury trial much of it may be entered on the record without being read at that time and the proceedings at trial accordingly shortened. The result is a more orderly arrangement of the documents and time for the prolonged study, necessary for a proper analysis of them, is afforded.

We do not recommend that any change be made in the Act in this respect.

(g) *Fines*

Our opinion is that there should be no statutory limit on the fines that the court may impose on either corporations or individuals found guilty of combines offences. The offences vary greatly in gravity. Such factors as the time over which the violations have occurred, the volume of business affected and the gains accrued by illegal practices make it inappropriate that a court, in fixing punishment, should be fettered by limits that may make the penalty manifestly inadequate. The general provisions of the Criminal Code applicable to other offences leave the amount of the fine, when pecuniary punishment may be awarded in lieu of imprisonment, to the discretion of the court and we consider that this principle should apply, for the reasons we have stated, to combines offences. We recommend, therefore, that the present statutory limits on fines should be abolished and that the amount of the fine, in each case, should be in the discretion of the court.

(2) *Supplementary Judicial Remedies*

The use of a judicial restraining order has been suggested from time to time as a promising addition to remedies. It would be of marked service in certain types of situation, of which the incipient combine, questioned practices in the twilight zone between competition and monopoly where the law is unsettled and the operations of the single-firm monopoly are illustrations. The analogy of the American injunction suggests itself. In the United States it has been widely used and found of value. Especially when employed in the framing of consent decrees it reaches situations where criminal prosecution may be ineffective or unsuitable, and introduces a useful element of flexibility into the administration of the legislation.

In this country it is unsettled whether constitutional and other legal obstacles stand in the way of the use of a remedy of this kind. It would be of advantage if the proper officers gave early consideration to the question. Already the courts have certain procedures of a preventive kind in the field of criminal law. Their power to bind over persons to keep the peace and to release

persons upon condition of future good behaviour approximate an injunctive process. There is, as well, a growing body of doctrine that the courts have jurisdiction to issue orders preventing the commission of public wrongs. It may be that express statutory power, as in the United States, will be found necessary before the courts can take action of this kind; but until the question is clarified by competent opinion it would be premature to propose such a change.

Constitutionally a strong case can be made that federal jurisdiction over criminal law includes steps essential to the prevention of crime and that the authorities should not have to stand idly by until wrong has been done if the situation lends itself to preventive measures. The trade and commerce head of section 91 of the British North America Act would provide still a broader base and would allow injunctive relief to apply to many more situations.

These, however, are questions upon which it is not the province of the Committee, in the present unsettled state of the authorities, to do more than indicate lines of development and consideration by the proper officers.

We consider however that there is one measure that might immediately form a part of the Act. In another section of this report we have proposed that power be given to the board to require, in certain circumstances, periodic reports from firms or groups of firms. A similar power might well be given to the courts in cases where they find that an offence against the legislation has been committed. This would guard materially against a repetition of an offence. The order we propose would be in addition and supplementary to the penalties which are now authorized.

There is at present a lack of machinery, short of a further investigation, for checking on the continuation of illegal practices. The proposed procedure would supply an expeditious and in our opinion, not unreasonable means of doing this. It would be subject to judicial control and have a close resemblance to procedures found useful in situations of lesser public importance in other branches of the criminal law.

For this purpose we recommend that provision be made that in any case in which a person or firm is convicted of any indictable offence against the combines legislation the court before which such conviction is made may order, in addition to any punishment authorized, that the offender shall file with the court such periodic reports in such form and containing such information as the court may direct until further order, or during such time as the court directs.

(3) *Tariff, Patents and Other Remedial Action*

In the field of remedial action, Canadian monopoly legislation has been based up to the present on federal jurisdiction in respect of criminal law, tariffs and patents. In practice however this field has been more restricted than it may first appear. The conditions that give rise to the power to initiate tariff and patent action, as set out in the Act, amount to establishing the existence of a combine and thus are based on criminal law as if the Federal Government had not full powers to act in respect of tariffs and patents when conditions incompatible with the public interest are found to exist. This situation may well contribute to explain why the tariff and the patent clauses in the Act have not been extensively used.

Thus, our monopoly legislation has been entirely based on criminal law and quite unnecessarily so. This particular feature explains to a large extent why the history of Canadian policy has been up to the present relatively simple.

The Combines Investigation Commission has been considered as having in the main an exclusive responsibility in this field; the other government services have not been inclined to take that aspect of our general policy into account in carrying out their own activities. Such an arrangement contributes to weaken our anti-monopoly policy, if not to contradict it. Such an extreme administrative specialization, coupled with constitutional difficulties, has greatly restricted the

scope of remedial action. In this field, we have been left, for all practical purposes, with publicity, as a preventive measure, and with criminal prosecution as practically the sole curative remedy. On the whole then, we have relied almost exclusively on criminal action to attain the objectives set out in our anti-monopoly policy.

(a) *Tariff and Patent Action*

Since its early years, our combines legislation has always contained provisions for tariff and patent action in combines cases. The principle justifying such provisions is obvious; the protection afforded to industry by the tariff and patent policies of the government should not be used to gain or to maintain substantial monopoly power. It should be recognized that they are not universal remedies and that the fact that they are not primarily aimed at serving the anti-monopoly policy restricts the field of their application.

To reduce or even abolish the tariff on a temporary basis will constitute a very effective remedy in some monopoly cases, provided that it is viewed in its proper perspective and that adequate administrative arrangements to initiate action are worked out. That is why we propose that the board should envisage the possible effectiveness of tariff action in every case presented to it and report its findings in this respect. In addition, we suggest that the present condition allowing for tariff action is too rigid, since the Governor in Council has to find to his satisfaction that "there exists any combine to promote unduly the advantage of manufacturers or dealers at the expense of the public". We propose therefore that section 29 of the Act dealing with tariff action be amended and that the requirements of the public interest be made the condition justifying a recommendation in this respect.

The legislative grant of patent rights, by ensuring to an inventor the fruits of its ingenuity, is intended to encourage innovation, but it should not lead to abuses and confer powers incompatible with the public interest. When such undesirable conditions arise, and on application by the Attorney-General of Canada, the Exchequer Court may issue orders restricting or revoking the patent right or requiring compulsory licensing. The fact that the Combines Investigation Commission has not yet met many cases where this type of action would have been effective does not mean that it lacks value. No doubt there may be situations where substantial monopoly power is gained or maintained through patent rights. These are more likely in highly concentrated industries where the techniques of production are relatively recent and complicated. If investigations are directed into that industrial sector, patent action may well prove to be a very useful device.

Our proposals regarding patent action are similar to those already formulated in respect of tariff reduction. We think that the board should consider the impact of patents in every case presented to it and report its findings. Furthermore, we believe that the condition permitting the initiation of patent action is more rigid in the Combines Investigation Act than in the Patent Act. The requirements of the public interest should be sufficient to recommend patent action.

(b) *Other Remedial Action*

Numerous other aspects of the Federal Government policy may greatly contribute to strengthen or weaken monopoly power. Money lending, currency management, negotiation of international trade agreements, import and export controls, public works, taxation, technological research may all directly or indirectly affect the interests of particular business groups. The way our legislation on banking, insurance companies and corporations is framed and administered may also greatly affect the monopolistic picture of our industry.

Of course, this does not mean that the aims of our monopoly policy should become the sole purpose of our general policy. It certainly means however that in framing legislation or before making an administrative decision all the elements of the public interest should be considered and that the one served by anti-monopoly policy should not be neglected.

In order to effect this integration which would no doubt contribute to a more effective anti-monopoly policy, we consider that the following arrangements should be made. First, administrative procedures should be found so as to ensure close liaison and permanent contact between the board and other departments of government whose activities may affect the competitive structure of our economy. Second, the board should be able to recommend any legislative or administrative change within the competence of Parliament if of the opinion that in any case presented to it such change could be used as an effective remedy to correct an undesirable monopolistic situation or practice.

We therefore recommend:

1. That the use of the tariff and patent clauses of the Act should be given special consideration in cases presented before the board.
2. That section 29 of the Act dealing with tariff action and section 30 of the Act dealing with patent action be amended in order to make the requirements of the public interest the condition justifying a recommendation and action in these respects.
3. That in any case presented to the board, the various aspects of the Federal Government's policy should be carefully reviewed in so far as they affect monopolistic situations and practices in order to see if they could be used as effective remedies.
4. That administrative arrangements should be established so as to ensure close liaison and permanent contact between the board and other departments of government whose activities may affect monopolistic situations and practices.

C. *General*

(1) *Research*

Research in the field of monopolistic situations and practices should become one of the most important assignments of the investigation and research agency. Information concerning this aspect of the organization and the working of our economy is badly lacking in Canada. Very few studies have been made in this field and they are all incomplete and often out-dated.

Such a situation can easily be explained. The job to be done is so complex and wide in scope that it cannot be carried on an individual basis without any integrated and long-range plan. Furthermore, private individuals and research organizations cannot be expected to fulfil that function adequately because, apart from financial limitations, they are not in a position to get the necessary information. In this field more than in any other, businessmen are reluctant to answer questions, to give the facts and disclose their secrets. On the other hand, in government, the only agency that could have been interested in this type of research was the Combines Investigation Commission. However, research has been up to now, only a secondary task and usually, its relatively small staff was completely absorbed in the actual work of investigations. It is not surprising, then, that so little is known about monopolistic situations and practices in Canada.

A sound programme of empirical research on this vast subject is much needed at present. At least our main industries should be the objects of continuing study and observations. Facts should be systematically assembled concerning the behaviour of an industry and its current policies bearing on prices, production, innovation, investment, costs, profits, market areas, business practices, the use

of patents, corporate structures and inter-relations as well as any other matter affecting competitive conditions. We need to know much more in detail than we now do the various aspects of the movement of concentration of economic power in Canada. Large business units raise a special problem for public policy but factual knowledge is much too scanty to warrant any specific proposal. Judgment on the giant enterprise cannot be final before extensive empirical research has provided the facts concerning their organization, their processes of business policy formation and their performance. Our knowledge in the wide field of monopolistic practices is just as inadequate. Such practices as discrimination, "loss-leaders", price leadership, tying contracts, combination sales, advertising, basing-point systems and probably many others should be subjected to empirical studies in order to know their extent, their operation, their effects and the remedies to cope with them if necessary. Finally, some attention should be given to the field of remedies in order to add to the rather restricted list of weapons we are now using to combat undesirable monopolistic situations and practices.

A research programme defined along these general lines would serve several important purposes. First, it would afford great assistance to investigators in indicating the dangerous spots in our economy that need to be closely watched and in supplying up-to-date and pertinent preliminary information. Thus, investigations could be more carefully planned, the sectors to be investigated could be selected after consideration of the overall picture and the points to be covered by investigations could be precisely defined. Second, in some cases, factual studies would make the ordinary investigation unnecessary and would permit a more rapid application of the law. Third, it would put the emphasis on the most desirable remedy in each case, thus in many instances, where the possibilities of restoring competition are remote, supplying means of correction superior to criminal prosecution. Gradually, it would be possible to get an adequate idea of the sector of our economy which is competitive and which should remain so; a better knowledge would also be provided of the composition and working of the other sector which is likely to remain monopolistic. Fourth, the publication of such research studies would greatly contribute to inform the public about the performance of our economy and to avoid the spreading of prejudices caused by ignorance. If exploitation and unfairness exist, the public has the right to know it; on the other hand, if private enterprise is efficient and alert, it has the right to be protected against prejudices and unjust demands. Finally, factual studies and the constant search for new remedies will enable Parliament to improve our anti-monopoly legislation and to adapt it to the changing requirements of the public interest.

Some of the information necessary to carry out such a programme is already available in different government departments. Duplication with these other agencies in the collection of data should be avoided but it is to be expected that these services will fully cooperate with the investigation and research agency in supplying to it the required information available to them.

On many subjects, however, field work and the collection of original data will be necessary. Then the agency will need the collaboration of businessmen, especially in the sector of large-scale enterprises where monopoly power is concentrated. It is not an undue obligation to ask for such cooperation because large firms and in particular those possessing a high degree of monopoly power have a direct responsibility to the public to make available much more information about their behaviour than they have been accustomed to give. Moreover, it is in their own interest to cooperate in this work, because knowledge of the whole truth is the only way in which prejudices and suspicion—if unfounded—can be dispelled. If, on the other hand, they refuse to collaborate, then, they should be obliged to supply information concerning their monopolistic position or practices.

In order to avoid possible abuses we think that the powers of the agency should be limited in two ways: first, instead of publishing itself the results of its studies, it would present them to the board to be considered and appraised and the board would have the responsibility of making the report; second, the power to require persons to supply information to the agency would be on application to and with the approval of the board. These safeguards should be sufficient to afford adequate protection to businessmen and firms, without paralyzing the research activities of the agency.

(2) *Uncertainty*

One of the main complaints about the present legislation is that it is vague and uncertain. Businessmen claim that they are unable to tell, in view of the generality of the wording of the Act, what practice may be lawful and what may be unlawful. To meet this criticism, it was suggested that a list of permitted and prohibited practices be included in the legislation.

Uncertainty and vagueness are no doubt present in our legislation, but to a lesser degree than is sometimes asserted. As cases brought before the courts accumulate, uncertainties inherent in this type of legislation are reduced to a moving zone composed of borderline cases resulting mainly from the evolution and the changing character of business practices. The courts, in Canada, have certainly helped to minimize vagueness: their interpretations of the Act have been precise and consistent.

It is true that our legislation is couched in general terms and is subject to the interpretations of the courts. There is therefore some uncertainty but it is not unfair to say that it is uncertainty as to whether particular variations of doubtful practices will be permitted. Any gain in certainty by the device of specifying permitted and prohibited practices would be more than outweighed by loss of range and flexibility.

If such a list were substituted for the broad definitions of our present legislation, undesirable consequences would follow. Such a suggestion ignores the very nature of monopolistic practices and their ever changing character. As we have attempted to show in defining the monopoly problem, the list of monopolistic practices is never complete and the arrangements themselves are always susceptible of further refinements. To include such a list in the legislation would thus encourage the discovery of new devices in order to avoid the law. Moreover, it has also been shown previously that almost all the monopolistic and restrictive practices have a common feature: they *may* lead to monopoly, but they do not *necessarily and always* bring about such result. In order to know if they are *in fact* monopolistic and restrictive, it is necessary to consider the concrete circumstances peculiar to each case. Thus it is undesirable and almost impossible to base anti-monopoly legislation exclusively on the principle of specific prohibition.

On the other hand, it would be possible to supplement general prohibitions by a list of practices which would be objectionable. However, such a list would not be very useful because it would have to be limited to those practices which are so clearly restrictive that nobody would doubt that they are covered by the general prohibitions. The majority of monopolistic practices could not be classified and included in the list so that uncertainty would remain.

It must then be recognized that in most cases covered by the monopoly field, the relations are so complex, the facts so various and the situations so changing that it is fruitless to lay down fixed rules or to expect to reach finality in policy. Within general rules, only a case-by-case examination can afford a basis for judgment and the flexibility so much needed in this field. Uncertainty and vagueness must to a degree necessarily follow.

As to those who complain about such a disadvantage, they must not forget the fundamental requirements of the free enterprise system in which they live. As it was shown in a previous section of this report, private initiative and freedom from government intervention is justified only when complemented by freedom from private monopoly power and by the action of competitive forces. Those who escape from the rigorous conditions of the competitive rule must expect to be subjected to legislation designed to check monopoly power and to such uncertainty as is inherent in this type of legislation.

We therefore conclude that it is undesirable to include in the Act a list of permissible practices. There is a good deal of complaint of uncertainty as to permitted practices and exposure to inquiry on the part of business firms, but it is not unfair that certain disadvantages and responsibilities should go with the possession of monopoly power and that freedom from inquiry should belong to those in highly competitive industries who have avoided restrictive agreements or any semblance of them.

(3) *"Loss-Leaders"*

In its Report on Resale Price Maintenance, the Committee has already stated that the practice, when it existed, of using various branded goods as "loss-leaders" was not in the public interest. It was indicated that the Committee did not, however, fear that in the present circumstances the "loss-leader" problem was likely to be important if resale price maintenance were prohibited. Though contrary opinions were expressed, the Committee is satisfied that the evidence since the passing of the amendment confirms its judgment. Only one representation has been made to us on this subject.

The matter is one which is complex, particularly when dealt with in legislation which is based chiefly on criminal law. The facts are much more various than one would suppose from reading the contentions of those who advocate systems of resale price maintenance. The practice requires careful definition as mere prohibition of selling below invoice cost would affect a very limited proportion of cases. Leeway must be given in some cases at least for the disposal of surplus stock. In any case there does exist in section 498A(c) of the Criminal Code some protection against the most extreme uses of the device.

We therefore propose that the "loss-leader" practice should be referred by the Minister for thorough study by the proposed agency and board with a view to determining its prevalence and its effects and to recommending to the Minister suitable amendment, if necessary, of the Act.

IV. RECAPITULATION OF RECOMMENDATIONS

A. *Administration*

1. *Separation of Functions*

We recommend:

(1) That there should be separation of function between investigation and research on the one hand and appraisal and report on the other hand.

(2) That to effect this separation of function the present duties of the Commissioner should be divided and assigned to two separate agencies—an agency for investigation and research and a board for appraisal and report.

2. *The Investigation and Research Agency*

We recommend:

(1) That there should be an investigation and research agency.

(2) The agency should be composed of two divisions—the investigation division and the research division.

(3) That the agency should have the same functions and powers as the Commissioner has under the present Act except that:

(a) Its functions should be:

(i) To conduct the investigations under the Act;

(ii) To present the results of its investigations before the board;

(iii) Upon the request of the Minister or of the board or on its own initiative to compile information and conduct general or specific research projects concerning the existence and the effects of monopolistic situations and practices;

(iv) To present the results of its studies to the board.

(b) The power to enter and examine premises and records and to call witnesses should be on application made *ex parte* to the board.

(c) The agency on *ex parte* application to and approval of the board should have the power to require persons to supply information relevant to research into monopolistic situations and practices.

3. *The Board*

We recommend:

(1) That an administrative board should be established reporting to the Minister and composed of members chosen for their knowledge, skill and integrity and not as representatives of interested groups and appointed for a tenure that would secure their independence.

(2) That the functions of the board should be:

(a) To hear the oral evidence and to consider and appraise all evidence presented to it by the agency and such other evidence as may be necessary to ensure that persons under investigation shall have had full opportunity to be heard; and to report and make recommendations thereon.

(b) To consider and appraise the results of studies conducted by the agency on monopolistic situations and practices and to report and make recommendations thereon.

(c) Upon the request of the Minister or on its own initiative to inquire into and make recommendations from time to time for legislative change.

(3) That the board should have the powers of a commissioner under the Inquiries Act and such of the powers of the Commissioner under the present Combines Investigation Act as may be necessary to carry out its functions.

In addition, it should have power:

(a) To request the agency to compile information and to conduct general or specific research projects concerning the existence and effects of monopolistic situations and practices.

(b) To require a firm or a group of firms to submit special or periodic reports in order to enable the board to assess its or their operations in the light of the purpose of the Act if, in the course of an investigation, the board finds that the firm or the group of firms exercises substantial monopolistic powers.

(c) To authorize any of its members to exercise the powers and perform the duties of the board except that of reporting.

(4) That provision be made enabling the board to apply to the Governor in Council for the appointment of examiners to take oral evidence.

(5) That the report should retain its importance and that its scope should be widened and its significance strengthened. It should review the evidence, appraise the conditions and practices under review and contain recommendations as to remedies including tariff and patent action and other government action. The existing provisions (except for the substitution of the board for the Commissioner) concerning the publication of the report should be continued.

B. *Remedies*

1. *Criminal Prosecution*

We recommend:

(1) That consideration be given to the transfer to the Combines Investigation Act of those parts of sections 498 and 498A of the Criminal Code which create offences not now contained in the Combines Investigation Act.

(2) That paragraph (*a*) of section 498A of the Criminal Code be re-drawn so as to make it clear that it is directed against a practice and not against a single transaction.

(3) That section 1141 of the Criminal Code be amended to make clear that it does not apply to combines offences.

(4) That the present form of section 39A of the Combines Investigation Act should be continued.

(5) That no change should be made in the Combines Investigation Act in respect of jury trial.

(6) That the present statutory limits on fines should be abolished and that the amount of the fine in each case should be in the discretion of the court.

2. *Supplementary Judicial Remedies*

We recommend:

(1) That the proper officers give early consideration to the question of whether constitutional and other legal obstacles stand in the way of the use of a judicial restraining order.

(2) That provision be made that in any case in which a person or firm is convicted of any indictable offence against the combines legislation the court before which such conviction is made may order, in addition to any punishment authorized, that the offender shall file with the court such periodic reports in such form and containing such information as the court may direct until further order, or during such time as the court directs.

3. *Tariff, Patent and other Remedial Action*

We recommend:

(1) That the use of the tariff and patent clauses of the Act should be given special consideration in cases presented before the board.

(2) That section 29 of the Act dealing with tariff action and section 30 of the Act dealing with patent action be amended in order to make the requirements of the public interest the condition justifying a recommendation and action in these respects.

(3) That in any case presented to the board, the various aspects of the Federal Government's policy should be carefully reviewed in so far as they affect monopolistic situations and practices in order to see if they could be used as effective remedies.

(4) That administrative arrangements should be established so as to ensure close liaison and permanent contact between the board and other departments of government whose activities may affect monopolistic situations and practices.

C. *General*

We recommend:

(1) That research in the field of monopolistic situations and practices should become one of the most important assignments of the investigation and research agency.

(2) That it is undesirable to include in the Act a list of permissible practices. There is a good deal of complaint of uncertainty as to permitted practices and exposure to inquiry on the part of business firms, but it is not unfair that certain disadvantages and responsibilities should go with the possession of monopoly power and that freedom from inquiry should belong to those in highly competitive industries who have avoided restrictive agreements or any semblance of them.

(3) That the "loss-leader" practice should be referred by the Minister for thorough study by the proposed agency and board with a view to determining its prevalence and its effects and to recommending to the Minister suitable amendment, if necessary, of the Act.

RESALE PRICE MAINTENANCE

AN INTERIM REPORT

OF THE COMMITTEE TO STUDY

COMBINES LEGISLATION

LETTER OF TRANSMITTAL

OTTAWA, October 1st, 1951

The Hon. STUART S. GARSON, P.C., K.C.,
Minister of Justice and Attorney-General of Canada,
Ottawa, Canada.

DEAR AND HONOURABLE SIR,

We submit herewith our report on resale price maintenance.

Yours very truly,

J. H. MACQUARRIE
W. A. MACKINTOSH
G. F. CURTIS
MAURICE LAMONTAGNE

Committee to Study Combines Legislation.

CONTENTS

FOREWORD

We were appointed a Committee to study combines legislation.

The terms of reference were: "to study, in the light of present day conditions, the purposes and methods of the Combines Investigation Act and related Canadian statutes, and the legislation and procedures of other countries, in so far as the latter appear likely to afford assistance, and to recommend what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy."

Our appointment was announced by the Minister of Justice in the House of Commons on June 27, 1950. Early in July, through the press and by letter, widespread notice throughout Canada was given that the Committee was anxious to receive from individuals, firms and organizations whatever views they might wish to express upon the matters within the terms of reference. National organizations were asked to inform their affiliated groups and individual members of the desire of the Committee to secure as wide an expression of opinion as possible.

In this, as throughout our work, the press gave most helpful co-operation.

Many submissions were received by the Committee in the succeeding months. In addition to the written submissions, opportunity was given for all interested persons to meet with the Committee to discusss and amplify any matters arising out of their written representations. Many such meetings were held and, together with the written submissions, were of great assistance.

In the letters and notices sent out by the Committee, attention was called to the problem of resale price maintenance, as part of our study, in the following terms:

> You may recall that the Royal Commission on Prices in their examination of restrictive business practices gave particular attention to the practice of resale price maintenance and recommended that careful study be given to this problem from the viewpoint of its effect on price competition amongst wholesalers and retailers. In view of this the Committee invites comments on this particular problem as well as on the Combines Investigation Act generally. In particular, the Committee would appreciate receiving extended comments on the tentative conclusion of the Royal Commission on Prices as to the effects of the practice upon the public interest. The matter is dealt with in Volume I, pages 27, 28 and 41, and Volume II, pages 256 to 259 of the Report of the Royal Commission on Prices as published by the King's Printer in 1949.

By letter dated September 10, 1951, the Minister of Justice invited the Committee to submit, if possible, the results of its study on this aspect of its assignment at an early date, in October 1951.

The following, by way of interim report, is the report of the Committee on resale price maintenance.

I. INTRODUCTION

1. Definition of resale price maintenance

Among restrictive trade practices, resale price maintenance is probably the best known and has been widely analyzed and discussed. By resale price maintenance we understand the practice designed to ensure that a particular article shall not be resold by retailers, wholesalers or other distributors at less than the price prescribed by the supplier, that is, in most cases, the manufacturer. Measures to enforce the prescribed price may take different forms, such as warnings, fines, the denial of supplies, and withdrawal of discounts.

Resale price maintenance may be established either on a collective basis by an agreement among rival suppliers (horizontal) or on an individual basis by a single supplier (vertical). The collective schemes need not be discussed; they are generally recognized as being against the public interest and illegal in Canada. Consideration will therefore be restricted to the maintenance of resale prices by individual suppliers.

2. The extent of the practice

It is difficult to measure precisely the extent of resale price maintenance. In the United Kingdom, a recent White Paper entitled "A Statement on Resale Price Maintenance" states:

> "It has been estimated that in 1938 about 30 per cent of the public's expenditure on consumer goods was on price-maintained articles and it seems likely that this percentage has since gone up rather than down.[1]"

Estimates for Canada which we have received from private sources of "about 500 items", "2000 to 3000 articles" and "12 to 15 per cent of department store sales" are obviously not based on accurate or comparable definitions. The Committee, however, is satisfied that the practice of fixing resale prices is widespread, that it covers whole classes of goods, and that, if not quite as comprehensive as in the United Kingdom, it is yet of significant and growing proportions.

3. Standards of judgment

By what standards should resale price maintenance be judged a desirable or an undesirable practice? They can be suggested in simple form by two sets of questions.

First, does the system place the determination of prices, which is the mutual concern of producers and consumers, under social control either through competition or public regulation or does it set up a system of control by private law or agreement? Does it prevent the consumer from exercising his full influence in determining what services he is willing to pay for and what services he deems too expensive? In brief, does the system facilitate or restrict competition?

Second, how does the maintenance of resale prices affect prices, production, distribution and consumption? Does it promote efficiency in the economic system providing the consumer with the goods and services he requires at the least necessary prices? Does it direct adequate but no more than adequate resources to the distributive system? This is the standard of economic efficiency.

[1] Board of Trade, *A Statement on Resale Price Maintenance*, June, 1951, page 3.

4. Submissions received

As indicated above, the Committee received a great many briefs, nearly all of which made some reference to resale price maintenance. They reveal divergent opinions on the subject. Although there are some notable exceptions, in general the associations representing manufacturers, wholesalers and retailers favoured resale price maintenance. On the contrary, co-operatives, labour unions, farmers' and consumers' associations expressed opposition to the practice.

In the following section of this report, we set out the views and contentions of these groups as expressed in their briefs in so far as they bear on the two standards of judgment which we have set up. We have also cited views from other sources equally relevant.

II. VIEWS PRESENTED TO THE COMMITTEE

A. Resale price maintenance and a free economy

In order to test resale price maintenance by the first standard of judgment set up, we must ask such questions as: does it eliminate or lessen competition? Does it strengthen or weaken the influence of the consumer in the market? Does it protect or discourage monopolistic influences? In other words, is it compatible with measures "for the encouraging and safeguarding of our free economy"?

The answers given to these questions vary considerably. Manufacturers' or distributors' associations argue that the practice does not eliminate competition and that it may even contribute to a free economic system. On the other hand, labour, farm organizations and consumer groups assert the contrary. In succeeding paragraphs, there are set out relevant and representative views urged upon the Committee.

(*a*) *Resale price maintenance favours competition*

The supporters of resale price maintenance argue that it is not incompatible with a free competitive system mainly because it permits product competition, prevents economic concentration as well as the use of monopoly power in the retail field and discourages vertical integration.

1. Permits competition between products

It is contended that resale price maintenance does not eliminate the competitive mechanism because price-maintained goods are still subjected to competition from close substitutes. This argument is presented as follows in one of the briefs:

> It is further to be noted that the maintenance of the resale price of a certain article produced by a manufacturer does not in any way interfere with the right of other manufacturers to produce similar articles and price them as they wish and, further, the same or similar products may be imported and sold at whatever price the importer fixes. Moreover, there is nothing to prevent a retailer from selling under his own brand name competing goods at whatever price he sees fit to fix. Thus there is any amount of room for competition with the price-maintained goods.

This statement does not refer to price competition among retailers. It asserts only that resale price maintenance does not affect the competitive situation at the manufacturing level and that, if competitive conditions exist in that sector, product competition would still be effective at the retail level.

2. Prevents economic concentration in the retail field

Retailers' associations argue that resale price maintenance helps to keep the small independent retailer in business, thus ensuring an adequate number of outlets and preventing concentration of economic power in the retail field. Resale price maintenance is supposed to achieve those results by obliging all distributors to sell at a uniform price which provides an adequate margin of profit for the small retailer.

In the absence of resale price maintenance, three factors may contribute to eliminate small business and to bring about a greater concentration of

economic power. First, large department and chain stores, operating at a lower unit cost, may charge a lower price than the small retailer. Second, they are in a particularly advantageous position to use the "loss-leader" device in order to attract more business and gradually eliminate their smaller rivals. Third, it is pointed out in one of the briefs that the large stores have complete control over the price of their own brands and that, without resale price maintenance, price cutting would occur only on products also handled by dealers whose volume of trade is already too small to enable them to carry their own brands.

Without resale price maintenance, it is contended, large stores enjoying these advantages would expand, whilst the small retailer must be gradually forced out of business.

3. Prevents vertical integration

It is also argued that the absence of resale price maintenance may endanger the competitive system in another way: it may induce a large number of manufacturers to invade the retail field, thus intensifying the movement of vertical integration.

Manufacturers have found that the responsibility for their product does not end at the factory. If quality and reputation are to be maintained, their interest must extend right through to the consumer. The sector of the so-called technical goods which includes such things as motor cars, refrigerators, radios, vacuum cleaners, is certainly the one where manufacturers are most interested in the retail price and the service which accompanies the selling of the product. It is contended that if these manufacturers cannot fix the resale price of their goods they may decide to set up their own retail outlets.

> If a producer of a trade-marked article is prohibited from maintaining his established price, competition is created to such a ruinous extent that no retailer will want to handle the product and the producer will be forced to sell to the consumer direct or establish agencies, thereby imposing upon the small retailer a serious handicap, and the resulting displacement of small business would be a serious economic and social loss.

Under those conditions, making resale price maintenance illegal might act as an incentive for certain manufacturers to use the technique of vertical integration and to go into the retail business.

4. Prevents the use of monopoly power at the retail level

Finally, the supporters of resale price maintenance assert that the practice prevents the use of monopoly power at the retail level as well as its immediate consequence: excessive prices. The argument is presented as follows:

> [Without resale price maintenance] prices of an individual manufacturer's product would vary in different localities, largely dependent upon whether there was more than one dealer in its products. In small localities served by only one dealer, prices would tend to increase out of line with larger communities where there were a number of dealers.

According to this view, competitive conditions are too readily assumed throughout the retail field. In large communities, each retailer enjoys a certain degree of control over a portion of his clientele, in spite of the great number of his rivals. The degree of monopoly power increases with the decrease in the number of competitors, so that in small communities there may be only one seller for several lines of products. With resale price maintenance, monopoly power, where in existence in the retail field, does not present any real danger, since maintained prices are maximum as well as minimum.

(b) Resale price maintenance eliminates competition

The groups which oppose resale price maintenance assert that the practice eliminates price competition at the retail level, favours vertical integration and facilitates the elimination of competition in manufacturing.

1. Eliminates price competition at the retail level

It is pointed out that resale price maintenance eliminates price competition at the retail level in the sector of price-maintained goods. The manufacturer determines the price policy of the retailers; they cannot compete with each other in prices. Thus it is argued that resale price maintenance is a perfect substitute for the cartel device: what the retailers cannot do by agreement among themselves, they can achieve by agreeing separately with the manufacturer.

2. Favours vertical integration

It is also argued that resale price maintenance, because it gives the manufacturer most of the advantages of vertical integration, has induced some retailers to enter extensively the field of manufacturing in order to maintain their freedom of action.

According to this view, under a price-maintained scheme, the retail firm ceases to be a complete business enterprise of the conventional type, because it has no authority to determine the price of its product. It becomes to a large extent, an adjunct or a partial subsidiary of the manufacturer. This, in turn, produces a reaction from department and chain stores which want to safeguard their independence: they invade the field of branded goods with their own brands; they use their buying power to control some manufacturers; they go into the manufacturing business to produce goods for their own stores. It is finally contended that, although the extension of large retailers into the manufacturing field would probably have taken place in any case, it has, without doubt, been intensified by the generalization of resale price maintenance.

3. Facilitates elimination of competition in manufacturing

Finally, the opponents of resale price maintenance argue that it facilitates the elimination of competition among manufacturers. This view is presented as follows in one of the briefs:

> There is no doubt in our mind that allowing a single firm to set the retail price which must be charged by the agent, has stifled real competition within an industry where the large part of the business is in the hands of three or four large firms. It is a simple matter for the management of three firms to have gentlemen's agreements concerning the dealers' prices. Each dealer is then required by each of the big three to stick to the list price. Competition between retail agents and between manufacturers is severely restricted. Manufacture and sale of those articles are then virtually in the hands of an unofficial combine and there is no way today to break it.

Thus, it is said that resale price maintenance favours combinations in the manufacturing industries; it may even be essential to the working of an effective agreement at that level.

B. Resale price maintenance and economic efficiency

The terms of reference of the British Committee appointed to study resale price maintenance adequately set out the second standard of judgment, viz., economic efficiency. The Committee was appointed:

To consider the practice by which minimum wholesale and retail prices or margins for the resale of goods are fixed by producers and its effect on supply, distribution and consumption and to report whether, in the light of present conditions, and particularly of the need for the maximum economy and efficiency in the production and distribution of goods, any measures are desirable to prevent or regulate its continuance.[1]

Thus, if we want to consider the consequences of resale price maintenance upon economic efficiency, we must focus our attention on such phenomena as: prices, production, distribution and consumption.

As might be expected, there is a divergence of opinion on this subject in the briefs which have been presented to us. Some assert that resale price maintenance promotes economic efficiency and general welfare, while others advance the opposing view.

(a) Resale price maintenance promotes economic efficiency

The position of the supporters of resale price maintenance is best summarized by the following statement concluding one of the briefs:

> The system of price maintenance has benefited the consumer and the general economy by keeping retail prices down, by increasing retailer efficiency, by restraining monopoly, by assuring availability of quality brands which are at all times standards of comparison of similar lines, and by fostering fair and open competition.

We will now see how those different points are justified.

1. Produces a more stable price structure

According to its supporters, resale price maintenance produces a stable price structure and prevents excessive prices in both directions. Prescribed prices are minimum as well as maximum, so that unduly low and excessively high prices are avoided. This last characteristic of resale price maintenance is strongly emphasized in all the briefs supporting the practice. The following quotation is typical:

> To deprive a manufacturer of that right [to fix prices] is to make the way open for general frauds on the public and the possibility of dealers charging the public much more than the manufacturer intended is at least as great as the possibility that they will charge less. Particularly in times of scarcity will it be found that in default of resale price fixation many dealers will charge a quite exorbitant profit on such articles as are in scarce supply, thus doing harm to the public and hurting the business of the manufacturer of the branded article.

2. Promotes the interest of the manufacturer

It is alleged that resale price maintenance protects the interest of the manufacturer in several ways. First, it creates public confidence in the product and enhances the goodwill of the manufacturer. The argument runs as follows:

> When a manufacturer plans to put a new product on the market, he endeavours by market research and otherwise to find out the needs and preferences of the public and adapts his product accordingly as regards both style and quality. As regards price, his first step, of course, is to determine, in the light of the cost and other factors involved, what he should charge for his product. If, however, the manufacturer stops at this point and takes no interest in the prices at which the wholesaler or retailer resells his goods, it is obvious that some price variations might

[1] *Report of the Committee on Resale Price Maintenance*, London, June 1949, page 1.

result. When an article is usually sold at the same price throughout the country, and that price is well known to the public, variations from the recognized price lead the consumer to suspect that the quality has deteriorated. On the other hand, if the resale price is maintained and the article in question can be bought at the same price everywhere and at all times, the public comes to have confidence in the article and the price charged for it, with the result that the goodwill of the manufacturer is enhanced and the sale of the product is stimulated.

The same brief goes on to point out a second reason why the manufacturer is interested in resale price maintenance, which is the protection against the "loss-leader" practice:

> A good example of the kind of thing to which a manufacturer would be exposed if he were deprived of the right to exercise any control over the resale price of his branded goods is the so-called "loss leader" practice indulged in by certain retailers. In order to attract trade, certain retailers from time to time take some well known brand of goods and offer it below cost. If one retailer cuts the price of branded goods, it is natural for other retailers to cut the price still further. While this may temporarily stimulate sales, in the long run it has the opposite effect as it is disparaging to high quality goods to be sold as cheap bargains. Once the cut price results in the retailer selling at a price where he does not make a reasonable profit, he, naturally, devotes his energies to selling substitute goods on which he can still make his usual profit.

Finally, the last reason which is given for the manufacturer's support of resale price maintenance is that he can thus secure more retail outlets than he could otherwise do. When a producer fixes the retail price of his product, he can determine a satisfactory margin of profit which will induce the distributor to stock it and to promote its sale. The support of the distributor is always necessary to the manufacturer, but it is especially important when a new brand is introduced. Resale price maintenance is viewed as a very efficient technique to get that support and to ensure the widest possible distribution of a product.

3. Protects the specialized retailer

It is frequently said that the most active support for resale price maintenance comes from the independent retailers, especially the specialized dealers including those handling the so-called technical products. These distributors have not been able to prevent other traders, in particular, department and chain stores, from invading their field of business. They favour resale price maintenance, as a measure of protection against what they call unfair competition and as providing a more stable price structure. They justify the protection they require on the following grounds:

> Most consumer products manufactured by the electrical industry are highly technical and their successful use requires instruction in operation and skilled maintenance. These products are bought at infrequent intervals and the reputation of the manufacturer is largely dependent on the length of successful service which they give. It is therefore necessary for the manufacturer to insure that properly equipped and qualified dealers, who will remain in business, handle its products so that the public will receive value for its money. Value in this case does not mean first cost alone but length of time the articles give satisfactory service when related to first cost. Clearly, it is a false bargain to purchase an electrical appliance at a low price if it fails in service and for which it is impossible to obtain parts or service. To a lesser degree this is equally true if such parts and service are not readily available. In the sale of these products, the lowest cost dealer

is not necessarily the most efficient because the public derives the greatest benefits from the dealer who sells at a reasonable price and then gives the most efficient service. The manufacturer suggests a price which will provide this service and must have the right to refuse to sell dealers who do not recognize their responsibility.

Thus, the argument is fairly simple: the specialized dealer is essential to ensure an efficient system of distribution in the field of technical goods which require some servicing and resale price maintenance is necessary to the survival of the specialized dealer.

4. Favours the consuming public

It is finally alleged that resale price maintenance protects the consumers. First, the practice is supposed to fix fair prices and to prevent the exploitation of the public through excessive prices. Second, it establishes orderly marketing conditions, without which the public could not enjoy the benefits of mass-production. Third, it contributes to a better information of the consumers: they know in advance the price of branded goods, which makes it easier for them to plan their expenditures and facilitates shopping expeditions. Fourth, it is contended that the disadvantage of paying for services that may not be needed is more than compensated by the assurance that the product would not require any additional expenditure for a stated period and that servicing facilities would be available.

(b) Resale price maintenance discourages economic efficiency

In contrast, the opponents of resale price maintenance have contended that the practice discourages economic efficiency and does not promote general welfare.

1. Produces an unsatisfactory price structure

The first criticism made against resale price maintenance is that it replaces the competitive mechanism by an artificial and arbitrary method of fixing prices. Prices which result are administered prices and the manufacturers who exert that control do not have the knowledge and the interest necessary to determine the right price policy at the retail level:

> In price-maintained lines, these normal competitive forces are largely done away with at the distributive level, and an artificial method of pricing merchandise is substituted, by the manufacturer or supplier, at what he thinks the product is worth. . . . The manufacturer has no knowledge of the retailers' cost of doing business, and, yet, by price maintenance, he maintains control over the operation of the retailer in whose business he has no financial interest and in which venture he is taking no risk.

The price structure determined under a system of resale price maintenance is also said to be irrational in the sense that the same price is charged for different services and costs. Such a procedure is regarded as incompatible with recog nized principles of economics and justice:

> The retail price of any article, in order to be fair to the consumer, should bear some relation to the type of service given in the store in which the goods are bought and the cost of operation of such store. Even two stores offering the same type of service may operate at different expense rates. One may operate in low-rent and low-assessment area of a city and the other may operate in a high-rent and high-assessment part of the same city. The store operating in a low-rental area expects to draw customers to it by lower prices, because it is off location; and it is only fair to the customer to allow him to buy at lower prices in such locations if he takes the time and trouble to shop in those localities. Under a resale price

maintenance policy, the price is the same in each type of store, no matter what type of service is given and no matter in what location the store is situated and no matter what its cost of operation. There is no more reason why retailers should be forced to sell any given article at the same price as their competitors than there is to stipulate that two manufacturers of competing articles should sell their product at the same price.

Moreover, it is alleged that a direct consequence of the practice is to produce a price structure which is more rigid and higher than the one that would result from competition.

This method aims at stabilizing the price and preventing it from finding its own level. Generally speaking, it maintains the article at a price higher than it would be on a free competitive market. . . . Many credit stores now are selling price-maintained merchandise at the same price with 18 months to pay as they are for cash. Yet, retailers selling these same lines on a cash basis are prevented from selling below the price-maintained price. If markups on price-maintained merchandise are high enough to permit this practice, thev are too high.

Another brief goes on to say:

We feel sure that many efficient distributors would gladly reduce wholesale and retail margins from time to time in order to stimulate consumer demand. But, because of the fear of losing their agencies they are prevented from doing so by the practice of resale price maintenance forced on them by some manufacturers. Moreover, with little or no competition in price under this procedure, agents are often compelled, and sometimes required, to enter into wasteful programmes of advertising, servicing and the providing of extravagant showrooms and display facilities. Resale price maintenance thus is responsible for shouldering excessive distribution costs onto the ultimate consumer.

Thus, resale price maintenance is said to have an undesirable influence upon the price structure, guaranteeing too high margins and increasing distribution costs.

2. Makes for unstable production

The opponents of resale price maintenance seem to agree that the practice brings more stability into the price structure. That stability is not viewed as an advantage, however, since it is alleged that its consequence is unstable production:

The main argument by manufacturers and distributors appears to be that resale price maintenance prevents price wars or unfair price cutting and thus brings about more orderly conditions in the market. The practice certainly does these things—it prevents price cutting—and, at times of low demand, transfers "chaos" from the price market to the employment market. We would suggest that our system has progressed not because of rigidities in the price structure but in spite of them.

It is also argued that the practice does not promote the real interests of the producers. The manufacturer is interested in seeing that the portion added by distribution to the total price paid by the consumer be minimized, because his sales and his production are thus stimulated. Resale price maintenance does precisely the contrary: it increases the share of the distributor in the final price of the product by fostering high margins and excessive distribution costs.

3. Discourages efficiency in distribution

Resale price maintenance is supposed to discourage efficiency in distribution. One of the strongest incentives to the introduction of new devices designed to

reduce the cost of distribution is the possibility for the retailer to use the savings thus made to reduce his prices and to attract more customers. Resale price maintenance makes such a policy impossible and, to that extent, prevents improvements in efficiency:

> Retailing is a fluctuating type of business in which factors are always changing, and efficient retailers should seek out, at all times, new methods of bringing merchandise to the consumer which will reduce the retailer's cost and his prices to the consumer. In price-controlled lines there is very little incentive for the progressive retailer to do this, as, although he may reduce his cost of operation, he cannot pass on to the customer any saving thereby achieved and thus increase his sales. . . . Price maintenance tends to keep the cost of distribution high and stands in the way of the development of new forms of retailing and the introduction of new techniques which will result in low margins and hence lower prices.

Resale price maintenance does not only prevent improvements in efficiency, it may also protect inefficiency. The only margins which are satisfactory to all distributors are those which are sufficient to keep in business the retailers whose costs are highest. That is why it is stated that "mark-ups are invariably set at levels to keep in business inefficient distributors."

4. Is incompatible with consumers' interest

Consumers' associations and other similar groups have expressed to the Committee their opposition to resale price maintenance. Their main criticisms have already been formulated; in so far as the practice produces high prices and protects inefficiency in distribution, it injures the consumer. It is further argued that the right to influence retail prices and business methods in the field of distribution should belong to consumer rather than to manufacturer. The following quotation sums up the argument against resale price maintenance from the point of view of the consumer:

> The crux of the question of resale price maintenance is whether the consumer should reap the benefits of the most efficient forms of retailing or whether the consumer should be forced to pay more in order to make retailing and manufacturing a more comfortable occupation by removing some of the competitive practices which operate in a free economy to reduce prices to their proper level based on supply and demand and consumer preference. In our opinion, the consumer and the economy of the country gains the most by bringing goods to the consumer at the lowest possible price. This method sells more goods, expands the market and production and provides more employment. Anything that tends to protect any part of the economic system at the expense of the consumer should be carefully weighed before being encouraged. . . . There is room in Canada's expanding economy for all types of retailing, the large and the small, the high-styled specialty shop and the bargain basement, the service and self-service stores, the personal-service community store and the down-town store, and efficient retailers can operate profitably in whichever type of retailing they choose to engage. Consumers will adjust prices between the various types of stores according to their preference for price and service. It is not in the best interests of Canada nor in the interests of efficient retailers, whether small or large, to subsidize inefficient producers or retailers by price maintenance at the expense of the consumer.

It follows, then, that the consumer should not only be completely free to choose the product and the type of service he wants, but also, that he should pay a price which is related to the cost of the product and of the service he buys. This is precisely what is impossible to realize under a system of resale price maintenance.

III. THE COMMITTEE'S VIEWS

The Committee has given careful consideration to the arguments presented in the briefs. It has discussed at some length these various points with the groups directly interested as well as with many individuals who were concerned with the problem. These submissions and these discussions have been most helpful to us.

We have examined resale price maintenance in the light of the two standards of judgment already mentioned. We have not centered our attention upon individual cases of maintained prices and their possible isolated consequences, because if the application of resale price maintenance were restricted to a limited number of goods, the problem thus involved would not deserve the government's consideration.

The fact which impressed the Committee is that the practice is, at present, extensively applied and of growing importance in Canada. It was led, therefore, to view resale price maintenance as a well-established practice and to consider the over-all effects it may have on our economy if its generalization is not checked.

It is, therefore, in this perspective and in the light of present-day conditions that we will now present our own conclusions in respect to the two questions which have been raised, namely: does resale price maintenance favour a free economy? Does it promote economic efficiency?

1. The direct and immediate effect of resale price maintenance is the elimination of price competition among retailers in price-maintained goods; this is one of the main objectives of the practice. It has been argued that competition is merely transferred from price to service. On this point, we find ourselves in agreement with the British White Paper:

> It is often said that the practice does not prevent traders from competing in the services they give. But this begs the question. It is true that, in order to attract more customers, a trader may increase the amount and quality of his service. But the potential customers may be comparatively indifferent to extra service, whereas they would be glad of the original amount of service at a lower price. It is this alternative which resale price maintenance stops the trader providing.[1]

The growing restriction of price competition in the retail field represents a fundamental change in our market organization. The cost of distribution is a very substantial part of the price which the consumer pays. Changes which remove that part of the consumer price from the influence of competition seriously restrict the working of a competitive system.

2. Resale price maintenance facilitates and makes more effective horizontal agreements (open or tacit) among manufacturers.

The practice may easily help to produce an effect similar to that which would result from direct collusion. The same distributors usually handle the goods of rival manufacturers; on the other hand the manufacturer considers himself free, at present, to enter into a resale price arrangement with any distributor. Thus, manufacturers can produce the effect of a horizontal price agreement among themselves, if each one of them establishes, in a contract

[1] Board of Trade, *A Statement on Resale Price Maintenance*, June 1951, page 5.

with his distributors, retail prices and discounts similar to those which these distributors are bound to observe by their arrangements with other competing manufacturers. Corwin Edwards, who describes this aspect of resale price maintenance, concludes:

> Pressure from distributors promotes uniformity in the discounts; the self-interest of manufacturers may easily lead to uniformity in the factory prices.[1]

Moreover, resale price maintenance is very often a necessary complement to agreements among manufacturers, because it would be quite useless for manufacturers to agree on a certain price for their respective products, if price competition at the retail level disturbs the whole arrangement.

3. Resale price maintenance, to be effective, requires some method of enforcement. If a manufacturer merely indicates a resale price but makes no provision and takes no step to enforce it, then he has no real control over his distributors. However, when measures of enforcement are involved, resale price maintenance establishes a private system of law allowing no appeal to the courts of justice, as it is clearly shown in the British White Paper:

> It is worth noting, too, that a trader who, by charging too little for his goods, incurs these penalties at the hands of a trade association [or manufacturer] has no recourse to any higher authority; by contrast, a trader who charges too much and is proceeded against by the State, under price-control laws, can always appeal to a higher court. The penal proceedings which may have the effect of driving a shopkeeper out of his trade and which are directed not to the maintenance of a recognized standard or code of behaviour generally accepted as necessary in the public interest, but solely to the enforcement of a particular trade policy of questionable merit, take place behind closed doors and without any supervision by the courts or by Parliament[2].

4. Although precise information is lacking, there is some evidence that resale price maintenance contributes to price stability but that the general level of prices, thus stabilized, is higher than it would be under competitive conditions and production more unstable.

Comparisons between competitive prices and maintained prices are difficult to make and must be interpreted with prudence. One of the most serious attempts to effect such price comparisons was made in the United States by the Federal Trade Commission. Although the study was made with special reference to the drug trade, similar results were observed in other sectors. It led to several conclusions which are reproduced by A. R. Oxenfeldt in his book "Industrial Pricing and Market Practices":

1. ". . . when resale price maintenance became effective, it forced chain stores to increase their prices, while individual drug stores, on the average, showed price reductions which, however, varied considerably with the size of stores, and, for all independent store groups, the percentage decreases shown were much less than the percentage increases made by chain stores."

2. ". . . resale price maintenance affected the prices of different brands in quite different ways in different types of stores and even the same type of stores operating in cities of varying sizes." The price increases were greatest in large cities and in large stores.

[1] Corwin D. Edwards, *Maintaining Competition*, McGraw-Hill, New York, 1949, page 73.
[2] Board of Trade, *A Statement on Resale Price Maintenance*, June, 1951, page 4.

3. The range of prices charged for the same brand in various kinds of stores became smaller. After the passage of resale price maintenance laws, generally speaking, the stores that reduced their prices ". . . were not the stores that had been charging the highest prices: The reduction in the [price] spread was accomplished through compulsory increase from the lowest previous price."

4. ". . . in the drug trade, chain and department store groups that were forced to increase prices, generally were realizing substantial retail gross margins usually averaging 20 per cent or more on sales and sometimes 30 per cent or more before resale price maintenance became effective."

5. "The price increases forced upon the chain and department stores were accompanied usually by reductions in volume of the price-maintained brands sold by these stores."[1]

These general results are confirmed by the answer given by a businessman to the question as to how the manufacturer does determine resale prices:

> The answer, I am afraid, is that, lacking any very scientific approach, he [the manufacturer] does it by a process of trial and error. The retail price obviously has to be a compromise and since it is considered safer to put it a little too high than a little too low, it is usually a compromise on the high side.[2]

In the light of this evidence and of current information presented to the Committee, it seems clear that, while most schemes of maintained prices may provide only fair margins to the high-cost distributor, the general level of prices is higher with resale price maintenance than it would be if competition existed.

In particular, the practice represents an undue restriction on low-cost distributors, because it forces each type of retailer to sell at a uniform price, irrespective of his costs. Services, which are the real products that distributors have to offer, differ both in quality and cost. To force retailers to sell these services at the same price injures the low-cost distributor and the community as a whole.

Finally, it should not be forgotten that, to the extent that resale price maintenance brings more rigid and higher prices, it contributes to the instability of production and the reduction of sales, results which serve neither the interests of manufacturers nor general welfare.

5. Resale price maintenance prevents two possible forms of monopolistic practices which tend to produce unreasonable retail prices, namely, the use of monopoly power at the retail level and the "loss-leader" device.

Monopoly power in distribution may exist on a rather permanent basis in smaller localities, where a dealer is practically alone to sell several lines of products and on a temporary basis in larger communities in periods of scarcity. The use of that power normally leads to excessively high prices. Because maintained prices usually are maximum as well as minimum, the practice may prevent such abuses. It must be recognized that the manufacturer is not always in a position to maintain maximum prices: he may find the policing of such prescribed prices very complicated and he may have to yield to the pressures exerted by the retailers. However, if he decides to apply such a policy, resale price maintenance is not essential; all he needs is the power to prescribe and enforce *maximum* prices.

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[1] A. R. Oxenfeldt, *Industrial Pricing and Market Practices*, Prentice-Hall, New York, 1951, page 427.

[2] W. C. Behoteguy, "Resale Prices and the Tire Industry's Big Headache", speech before the Akron Chapter of the American Marketing Association, 1948.

The second practice, called the "loss-leader" device, is an aggressive weapon designed to attract customers for a whole range of goods by a particular type of selective and excessive price-cutting. Usually a well-known brand is used as "loss-leader" and it is sold at a price which has no direct relation to cost and may even result in a net loss.

Resale price maintenance, by prohibiting any normal price reduction, affords an effective protection against "loss-leaders" in the field of price-maintained goods. However, the Committee does not think that to withdraw from the retailer the right to make any price reduction is a satisfactory way of preventing unfair and excessive price-cutting. We are of the opinion that more direct and desirable weapons can be found to curb "loss-leaders".

6. Resale price maintenance no doubt encourages the operation of more retail outlets and exerts an influence against the concentration of economic power in the retail field. It also affords some measure of protection to the specialized dealer. However, the security and the encouragement thus provided to small dealers should not be exaggerated. On this point, the Committee wishes to make two comments.

First, the high margins determined by resale price maintenance may be used by large stores to expose the small retailer to a more acute form of competition in the field where prices are not maintained. The common policy of department and chain stores seems to aim at a certain desired margin for a department or unit. If the margins guaranteed in the sector of price-maintained goods are above the desired general level, large stores may be put in a position where they can reduce abnormally the price of products which are not maintained by the manufacturer.

Second, high margins do not necessarily mean high profits. High margins merely transfer competition from prices to services and often result in wasteful forms of competition in services thus increasing costs. Moreover, high margins provide a strong inducement to enter into the retail field, so that a too great number of outlets, coupled with the consequent reduction in the individual volume of sales and profits, may result.

Thus resale price maintenance may perhaps contribute more to discourage efficiency than to protect small business. Moreover, the Committee believes that there will always be a place for small dealers in retailing, provided they are efficient.

7. Resale price maintenance no doubt helps to protect the reputation of branded goods and facilitates advertising and sales promotion. However, the Committee is not convinced by the argument that the reputation of branded goods greatly suffers from normal price variations and that people will think quality has deteriorated, if prices are allowed to vary. If the "loss-leader" is taken care of, normal price reductions will not cause serious problems to the manufacturer.

It is true that advertising becomes more effective if the supplier can maintain a resale price. However, we think that advertising is too powerful a force to need special encouragement and we are not too worried by the slight disadvantage which would ensue if resale price maintenance were prohibited.

IV. GENERAL CONCLUSION AND RECOMMENDATIONS

The Committee has studied resale price maintenance in the light of the two standards of judgment originally set up, namely, the desirability of a free economy and the need for economic efficiency. This study has led the Committee to the general conclusion that resale price maintenance, on the growing scale now practiced, is not justified by either of these standards. It represents a real and undesirable restriction on competition by private agreement or "law" and its general tendency is to discourage economic efficiency. That is why, in our opinion, the prescription and the enforcement of minimum resale prices must be viewed as manifestations of a restrictive or monopolistic practice which does not promote general welfare.

The Committee, therefore, recommends that it should be made an offence for a manufacturer or other supplier:

1. To recommend or prescribe minimum resale prices for his products;
2. To refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum resale prices.

It is to be noted that the Committee does not recommend that it be made an offence to prescribe and enforce resale prices which are not minimum. It follows that suppliers would be free to suggest and enforce maximum resale prices. It should not be overlooked that the fixing of a specific resale price unavoidably involves the fixing of a minimum price. It is useful to compare these recommendations with the British proposal which reads as follows:

> The Government proposes to provide in the legislation to be introduced that manufacturers shall be entitled to indicate, recommend or prescribe only maximum prices for the resale of their goods and it will be unlawful to give any indication of resale price unless it is clearly stated that the price indicated is a maximum.[1]

As can be readily seen, the Committee's recommendations do not go as far as the British proposal. While in the legislation which is contemplated in the United Kingdom the manufacturer will not be entitled to mention any price, unless it is clearly indicated that it is a maximum, it would still be possible, in the framework of our proposals, to indicate a maximum or other price and to issue price lists, provided that it is made clear that the price mentioned is not recommended or prescribed by the manufacturer as a minimum.

The Committee is not prepared to recommend action so drastic that it would interfere with established practices of issuing list prices. It is of the opinion that it will be sufficient to prohibit the recommendation, prescription or enforcement of *minimum* resale prices. If all list prices were to be made enforced maximum prices, we think it not improbable that the result would be merely higher list prices.

As to the "loss-leader" device, the Committee believes that it is a monopolistic practice which does not promote general welfare and therefore considers

[1] Board of Trade, *A Statement on Resale Price Maintenance*, June, 1951, page 11.

that it is not compatible with the public interest. However, we do not believe that it presents any immediate danger: extreme forms of price-cutting are not very likely in this period of inflation and relative scarcity. Moreover, we are convinced that there can be found other effective and more desirable methods of controlling the "loss-leader" than minimum resale price maintenance. Present circumstances afford time to make a careful study of such methods and the Committee, therefore, does not think it imperative to make an immediate and hasty recommendation regarding that practice.